Supreme Court, U.S.
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NO._____

In The
SUPREME COURT OF THE UNITED STATES

LUANNE SZENAY,

Petitioner,

v.

JOAN YUKINS and WARDEN OF SCOTT CORRECTIONAL FACILITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW.

I. DOES THE ADMISSION OF A NON-TESTIFYING CO-DEFENDANT'S TAPED POLICE STATION CONFESSION, WHICH INCRIMINATED DEFENDANT SZENAY, VIOLATE THE CONFRONTATION CLAUSE WHERE THE STATEMENT BEARS NO INDICIA OF RELIABILITY?

II. DID THE JURY INSTRUCTION DEFINING THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT VIOLATE PETITIONER SZENAY'S RIGHT TO DUE PROCESS OF LAW BY FAILING TO CONVEY TO THE JURY THAT THEY MUST HAVE SOME DEGREE OF CERTAINTY OF THE DEFENDANT'S GUILT?

LIST OF PARTIES.

Luanne Szenay, Petitioner

Joan Yukins and Warden of Scott Correctional Facility,

Respondents.

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Order Accepting Magistrate Judge's Report and Recommendation, December 23, 1997, Luanne Szenay v Joan Yukins, United States District Court, Eastern District of Michigan, Southern Division, case number 97-70363.

Opinion of United States Court of Appeals for the Sixth Circuit, March 10, 1999, Luanne Szenay v Joan Yukins and Warden of Scott Correctional Facility, Sixth Circuit case number 98-1138.

CONCISE STATEMENT OF BASIS FOR JURISDICTION.

(i) The opinion of the United States Court of Appeals for the Circuit Court was filed with its Clerk's office on March 10, 1999. The Court's Mandate was filed April 1, 1999.

(ii) No order respecting rehearing has been entered.

(iii) This matter does not involve a cross petition for writ of certiorari.

(iv) 28 U.S.C. Section 1254(1) provides that cases in the Court of Appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISIONS INVOLVED.

United States Constitution, Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment, Section One.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONCISE STATEMENT OF THE CASE.

Petitioner Luanne Szenay was convicted on January 10, 1991, of conspiracy to commit first degree murder and first degree murder (App. p1). Szenay was jointly tried with co-defendant Shawn England, who was also convicted. On February 19, 1991 Szenay was sentenced to two mandatory terms of life imprisonment on both counts, one sentence parolable, the other not parolable. (App. p.26)

Timothy Szenay was shot to death by James Blau and Shawn England. Luanne Szenay was not present. (App. p.4)

Neither Luanne Szenay nor Shawn England testified at trial. Detective Harkin testified to a statement made by England implicating Szenay in the murder. (App. pp.88-92) England told the detective that Blau stated that Luanne Szenay would collect $300,000 in insurance and that Blau

and England would get 10 percent of that, $30,000. (App. pp.89-90) England also "said that Jim was getting money from Luanne before and after the homicide." (App. p.90) The morning after the shooting Luanne Szenay called Jim Blau (App. p.91). According to England, Szenay said that Tim had been killed, and was trying to make it sound as if she was surprising Blau, in case the phone was tapped. (App. pp.90-91)

A girlfriend of James Blau, Kim Tessin testified that when Blau arrived in Michigan she lent him money until he found a job. (App. p.107) Tessin also stated that she lent Blau $500 which was used to fly Shawn England back to Florida. (App. pp.108) Gary Blau, James Blau's father, testified that before James Blau left Michigan to return to Florida, Gary loaned James over $800 to get James' car repaired, and also loaned James Gary's Texaco credit card for gas money. (App. pp.109-111)

Robert Wummer, James Blau's employer in Florida, testified that after James Blau had returned to Florida Blau was in financial straits and was sleeping in his car. (App. p.56) Wummer had already loaned Blau several hundred dollars, and at Wummer's insistence, and in Wummer's presence, Blau called Luanne Szenay and pleaded with

Luanne to send him some money to help him out. (App. pp.56-57)

Luanne Szenay had filed a Complaint for Divorce, and had obtained an Order giving her exclusive possession of the Health Nut business. (App. p.116) Melony Szenay the stepdaughter of Luanne Szenay, testified that Tim and Luanne Szenay were often arguing and fighting, and that in one instance Tim Szenay had Luanne Szenay by the throat and was holding her against the wall. (App. p.102-103)

While working for the Health Nut, James Blau was stopped and accosted by Tim Szenay while Blau was driving the Health Nut van. (App. pp.101-102) Blau told Bret Fultz that he hated Tim Szenay. (App. p.100)

Bonnie Banaszak, an employee of the Health Nut, testified that James Blau said he wished Tim Szenay would come into the store "and throw a punch at him so that he could kill him and split the insurance money with Luanne." (App. pp.114-115)

After Blau returned to Florida, a private investigator, Donald Santini, struck up a relationship with Blau. Blau gave many different accounts of the actual shooting, and on one occasion claimed to have been the one doing the shooting, and kept changing the way he described the events. (App. pp.112-113)

James Blau testified at trial pursuant to a plea agreement, and admitted that he took the plea bargain to avoid the mandatory sentence of life without parole. (App. p.97-98) Blau said that the detective who arrested him lied to him and told him that Luanne Szenay had implicated him in murdering Tim Szenay. (App. p.98)

Petitioner Luanne Szenay filed a Petition under 28 U.S.C. 2254 for Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan. The District Court denied the Petition. (App. pp.21-25) The Sixth Circuit Court of Appeals affirmed the denial of the Petition. (App. pp.1-20) The majority opinion in the Sixth Circuit held "it was not unreasonable for the state court to conclude that the totality of circumstances surrounding the making of the statements by England bear sufficient indicia of reliability." (App. p.11) Judge Moore, concurring, found the admission of England's out of court statement violated the Confrontation Clause, but found the error harmless. (App. pp.17-20)

ARGUMENT.

I. THE ADMISSION INTO EVIDENCE OF A NON-TESTIFYING CO-DEFENDANT'S STATEMENT IMPLICATING DEFENDANT SZENAY VIOLATED THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT .

Neither Luanne Szenay nor Shawn England testified at trial. Upon England's arrest in Florida, Detective Harken obtained a tape recorded statement from England implicating Szenay in the murder. England's tape recorded statement was played for the jury. (App. pp.58-87) Detective Harken also testified to the contents of England's statement (App. pp.88-92)

Admission of a non-testifying co-defendant's confession implicating the defendant violates defendant's right of cross examination secured by the Confrontation Clause of the Sixth Amendment. **Bruton v. United States**, 391 U.S. 123; 88 S.Ct. 1620; 20 L.Ed.2d 476 (1968). Where a hearsay declarant is not present for cross examination at trial his statement is admissible under the Confrontation Clause only if it bears adequate "indicia of

reliability." **Ohio v. Roberts**, 448 U.S. 56, 66; 100 S.Ct. 2531, 2539; 65 L.Ed.2d. 597 (1980).

The state court's decision admitting the tape-recorded statement of England was contrary to the clearly established law decided by the Supreme Court in **Bruton v. United States**, 391 U.S. 123; 88 S.Ct. 1620; 20 L.Ed.2d 476 (1968), **Douglas v. Alabama**, 380 U.S. 415; 85 S.Ct. 1074; 13 L.Ed.2d 434 (1965), **Ohio v. Roberts**, 48 U.S. 56; 100 S.Ct. 2531 (1980) and **Lee v. Illinois**, 476 U.S. 530; 106 S.Ct. 2056; 90 L.Ed.2d 514 (1986). The opinion of the Court of Appeals for the Sixth Circuit, allowing into evidence a station-house confession of a non-testifying co-defendant, conflicts with these same decisions of this Court on the federal question of the protection afforded a criminal defendant by the Confrontation Clause. The Sixth Circuit's opinion creates such a low standard of "indicia of reliability" for admissibility that no station house confession of a co-defendant will be excluded.

A. ENGLAND'S STATEMENT BORE NO INDICIA OF RELIABILITY.

To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent

trustworthiness, not by reference to other evidence at trial. **Idaho v. Wright**, 497 U.S. 805, 822; 110 S.Ct. 3139, 3150; 111 L.Ed.2d 638 (1990). Admission of a statement under a "firmly rooted" hearsay exception indicates that the statement is so trustworthy that adversarial testing can add little to its reliability. **White v. Illinois**, 502 U.S. 346; 112 S.Ct. 736, 743; 116 L.Ed.2d 848 (1992). The collateral statements of co-defendant England implicating defendant Szenay are inherently untrustworthy, cannot provide the indicia of reliability required under **Idaho v. Wright, Idem**, and are not of such a nature that cross examination could not challenge their reliability.

Evidence possessing "particularized guarantees of trustworthiness" required for admission under the Confrontation Clause, "must similarly be so trustworthy that adversarial testing would add little to its reliability." **Idaho v. Wright**, 497 U.S. pp820-821; 110 S.Ct. p3149. (emphasis added)

A co-defendant's confession is presumptively unreliable as to passages dealing with defendant's culpability due to the co-defendant's desire to spread blame or curry favor. **Lee v. Illinois**, 476 U.S. 530, 545; 106 S.Ct. 2056, 2064; 90 L.Ed.2d 514 (1986). The motivation to spread blame or curry favor is generally present in post-

arrest, custodial situations. **Williamson v. United States**, 512 U.S. 594; 114 S.Ct. 2431; 129 L.Ed.2d 476 (1994) at 604 ("A reasonable person in [England's position] might even think that implicating someone else would decrease his practical exposure to criminal liability.")

Relevant circumstances surrounding the making of the statement in issue must "render the declarant particularly worthy of belief." **Idaho v. Wright**, 497 U.S. at 819; 110 S.Ct. at 348. The record must contain an "affirmative reason," arising from the circumstances in which the statement is made, rebutting the presumption that the statement is not worthy of reliance at trial, **Idem**, 497 U.S. at 821; 110 S.Ct. at 3150.

The Sixth Circuit's opinion below, following the Tenth Circuit's lead in **Earnest v. Dorsey**, 87 F.3d 1123 (C.A. 10, 1997), has strained the "indicia of reliability" standard of **Ohio v. Roberts** and the "particularized guarantees of trustworthiness" standard of **Idaho v. Wright**, into the presumptive admission of police station confessions. Garden-variety, in-custody statements can never be considered so reliable that "cross-examination would be superfluous." **Idaho v. Wright**, 497 U.S. at p820; 110 S.Ct. p3149. A codefendant's confession which has consistently been found to be "presumptively

unreliable" as to passages detailing the defendant's credibility, **Lee v. Illinois**, 476 U.S. p545; 106 S.Ct. p2064, cannot be rendered admissible by any "safeguards" instituted by the police in extracting the confession. Miranda – like police station safeguards cannot substitute for the constitutional safeguard of cross-examination. The absence of coercion or promises of leniency do not eliminate a co-defendants motivation to even the score or curry favor. England's admission to shooting Tim Szenay was against his penal interest and was self-inculpatory, awareness of Luanne Szenay as a third co-conspirator is not.

A statement collateral to a self-inculpatory statement is not admissible under F.R.E. 804(b)(3)[1]. **Williamson v. United States**, 512 U.S. 594; 114 S.Ct. 2431; 129 L.Ed.2d 476 (1994). England's statements incriminating Szenay did little or nothing to further implicate England. England's description of details of the murder may indicate he did not fabricate his role in the shooting, but does not eliminate his motive to implicate Szenay as a co-conspirator. The "true danger inherent in

[1] M.R.E. 804(b)(3), considered by the trial court, is identical to F.R.E. 804(b)(3).

this type of hearsay is . . . its selective reliability." **Lee v. Illinois**, 476 U.S. at 545; 106 S.Ct. at 2064.

A station-house confession inculpating the defendant is "inherently unreliable." **Lee v. Illinois**, 476 U.S. at 546, 106 S.Ct. at 2065. Circumstances which may suggest some elements of reliability in inherently unreliable statement only emphasize the vital importance of cross-examination in the presence of a jury to the truth determining process.

Blau admitted in cross-examination that his statement to the police was induced by the police artifice of telling Blau that Szenay had implicated him in the murder. (App. p.98) It is reasonable to assume that the same artifice was used to obtain England's statement. A confession elicited only after a co-defendant was told that the defendant already implicated him is a circumstance which fails to rebut the presumption that a co-defendant's statement cannot be trusted as regards a defendant's participation in the crime. **Lee v. Illinois**, 476 U.S. at 544; 106 S.Ct. at 2064. The police tactic of telling a suspect that a cohort has already implicated the suspect is specifically designed to appeal to the suspect's desire to shift or spread blame, curry favor, avenge himself or divert attention, the specific reasons **Lee** decided made a co-defendant's

statement inherently unreliable. **Lee** held that where the portions of co-defendant's statement implicating the defendant "are not thoroughly substantiated by the defendant's own confession" the admission of the co-defendant's statement is barred by the Sixth Amendment. 476 U.S. at p545; 106 S.Ct. p2064 Here, where Szenay did not confess, this indicia of reliability is absent, and **Lee** provides no basis for the admissibility of England's statement.

Cross-examination of Blau may have raised some doubts in the minds of the jurors. However, Blau's testimony was supported by the unimpeached, uncross-examined statement of England, vouched for in the narrative description of England's statement delivered to the jury by Detective Harken. A cross-examined England would discredit rather than bolster the testimony of Blau. It is impossible to conclude that cross-examination of England would be of "marginal utility."

Police station questioning does not afford "substantial compliance with the purposes behind the confrontation requirement." **Ohio v. Roberts**, 448 U.S. at 71; 100 S.Ct. at 2542. In **Ohio v. Roberts**, questioning of the declarant at a preliminary hearing challenged whether the declarant was being truthful, whether he actually

perceived what he related, and whether the declarant's intended meaning was accurately conveyed by the language employed. **Idem**, 448 at 71; 100 S.Ct. at 2541. No questions to England in the taped statement probed England's accuracy or truthfulness. In fact, England's first interview by the police was not taped, giving the police opportunity to iron out any inconsistencies before recording the statement. England's rehearsed, taped statement is replete with leading, suggestive questions from his police interrogators, (App. pp.60-87) indicating that England knew he was giving the police what they wanted. His accuracy and veracity were not probed. England's statement contained neither the safeguards to the truthfinding process provided by cross-examination, nor the indicia of reliability to render cross-examination superfluous.

B. THE SIXTH CIRCUIT HELD PETITIONER TO THE WRONG STANDARD OF REVIEW FOR HABEAS CORPUS PETITIONS.

The Sixth Circuit erred when it concluded that " . . . it was not unreasonable for the state court to conclude that the totality of circumstances surrounding the making of the statements by England bear sufficient indicia of reliability .

. ." (App. p.11) Neither the state trial court nor the state appellate courts made any ruling that England's statement itself bore any indicia of reliability. The trial court found England's statement admissible as a declaration against penal interest, (App. pp.52,53) contrary to **Williamson v. United States**, 512 U.S. 594; 114 S.Ct. 2431; 129 L.Ed.2d 476 (1994), found "instances of indicia of reliability that can be gleaned from the remainder of the record . . ." (App. p.52) contrary to **Idaho v. Wright**, and found that "there is a consistency between [Blau's] testimony and the confession of Mr. England," (App. p.53) contrary to **Lee v. Illinois,** 476 U.S. 530; 106 S.Ct. 2056; 90 L.Ed.2d 514 (1986). Thus, the Sixth Circuit's reliance on 28 U.S.C. 2254 (e)(1), that determination of a factual issue by a state court shall be presumed correct, (Sixth Circuit Opinion, App. pp.8-11) is misplaced. The state trial court made no finding of any indicia of reliability based on the circumstances of England's statement. The Sixth Circuit improperly imposed on petitioner the burden of "rebutting the presumption of correctness by clear and convincing evidence," 28 U.S.C. 2254 (e)(1).

C. ADMISSION OF NON-TESTIFYING ENGLAND'S CONFESSION AGAINST SZENAY WAS ESSENTIAL TO BOLSTER THE CREDIBILITY OF THE PLEA-INDUCED TESTIMONY OF HIGHLY IMPEACHABLE CO-DEFENDANT BLAU, AND WAS NOT HARMLESS ERROR.

Before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt. **Chapman v. California**, 386 U.S. 18, 24; 87 S.Ct. 824, 828; 17 L.Ed.2d 705 (1967). In determining whether an error was harmless the court must assess the probable impact of the confession on the minds of the average jury. **Harrington v. California**, 395 U.S. 250, 254; 89 S.Ct. 1726, 1728; 23 L.Ed.2d 284 (1969) For error to be harmless, it must have made no contribution to a criminal conviction. **Chapman v. California** , 386 U.S. at 26, S.Ct. at 829. Denial of "the right of effective cross-examination" would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it. **Davis v. Alaska**, 415 U.S. 308, 318; 94 S.Ct. 1105; 39 L.Ed.2d 347 (1974).

Reversal is required if there is a reasonable possibility the evidence complained of contributed to the conviction. **Yates v. Evatt**, 500 U.S. 391, 403; 111 S.Ct. 1884, 1892; 114 L.Ed.2d 432 (1991). For error not to contribute to the verdict is to find the error unimportant in relation to everything else the jury considered on the issue in question. **Yates v. Evatt**, 500 U.S. at 403; 111 S.Ct. at 1893.

The prosecutor in closing argument and rebuttal argument repeatedly stressed to the jury that Blau's testimony was corroborated by Shawn England's tape recorded statement implicating Szenay. (App. pp.117-120) The prosecutor emphasized that as soon as he was arrested, Shawn England implicated Luanne Szenay (App. p.117) This naming of defendant Szenay was damaging because it came long before Jim Blau arranged his plea bargain and thus had incentive to incriminate her.

The Magistrate's misplaced reliance on "particularly the similarity between England's statement and Blau's testimony at trial," (App. p.41), and the Sixth Circuit's conclusion that Blau's corroboration of England's statement was "significan[t]" (App. p.13) fail to take into consideration the significant opportunities for Blau to bring his testimony into conformity with England's taped and

transcribed statement, and Blau's desire to avoid an nonparolable life sentence through his plea bargain. Blau had ample time prior to trial to review England's statement before testifying. Further, England and Blau escaped from the Bay County Jail together while awaiting trial, allowing them several weeks to compare notes without government oversight prior to recapture (App. pp.92-94) Thus, there was substantial opportunity for Blau's corroboration of England's statement to be tainted. Boot strapping the statement of a non-testifying, co-defendant on the suspect, plea-bargained testimony of the co-defendant's accomplice gives the prosecution a two-for-one deal. The credibility of the testifying accomplice is bolstered by the uncross-examined statement of the non-testifying, co-defendant, while the error so created is determined to be harmless based on the accomplice's testimony.

The "substantial detail" in England's statement of events leading up to and including the murder that the Sixth Circuit concluded would be difficult to fabricate (App. pp.11-12) establish only that England participated in the murder, not Szenay's involvement.

Certain facts recited in the Sixth Circuit's opinion as implicating Luanne Szenay came solely from the testimony of James Blau and are uncorroborated: Szenay

gave Blau $350 for England's airline ticket (App. p.95); Blau purchased the shotgun with money from Szenay (App. p.96); that Luanne Szenay gave Blau directions earlier in the day to a relative's house to locate Tim Szenay (App. p.96); that Blau told England to burn a map, pictures and other items Luanne Szenay had given him (App. p.96); that Luanne Szenay gave Blau $800 in one-hundred dollar bills after Tim Szenay had been killed (App. p.97), that Luanne Szenay initially sent Blau "a couple hundred dollars" after Blau returned to Florida (App. p.97).

The sole direct evidence implicating Szenay came from the plea-induced testimony of a co-defendant who testified to avoid a non-parolable life sentence. Other incriminating evidence against Szenay was suggestive at best, certainly not overwhelming. Where the sole witness offering direct evidence against Szenay has a strong motive to fabricate, admission of an uncross-examined statement supporting Blau's testimony cannot be considered harmless.

England's statement was badly needed by the prosecution to bolster Blau's testimony. Blau's credibility and character were seriously impeached at trial. Blau told undercover Detective Santini that he was the one firing the shotgun which killed Tim Szenay, whereas at trial he

testified that England had fired the shotgun. Blau was described as a "coke freak" who tried to convince Santini that he was a coke dealer both in Michigan and Florida.

The evidence against Petitioner Szenay was not overwhelming. The only direct evidence against Szenay was the plea-bargained testimony of James Blau. Blau and England took every action in preparing for the murder, from the purchase of the shotgun, (App. p.104-105) to the borrowing of the car used. (App. p.106) Blau borrowed money from his girlfriend, both before and after the killing, App. pp.107-108) and borrowed money and a gasoline credit card from his father so he could return to Florida. (App. pp.109-111) Although Blau said he expected Luanne Szenay to leave him money in a brown Chevette, in fact, no money was left there. (App. at p.96-97)

Blau borrowed air fare to fly England back to Florida from a girlfriend, Kim Tessin, after Luanne Szenay refused. (App. pp.89,108) When he returned to Florida, Blau was reduced to sleeping in his car. (App. p.56)

The $1,000, mailed to Blau in Florida was mailed after Blau called Luanne Szenay in the presence of his employer, Robert Wummer, and pleaded for money on the basis that he owed his employer several hundred dollars, and that he was destitute. (App. pp.55-57)

During deliberation the jury requested to have England's tape recorded statement played (App. at p.117) Not only is there a reasonable possibility that England's statement contributed to Szenay's conviction, it is inconceivable that the jury did not rely on England's statement in convicting Szenay. The observation by the Sixth Circuit that England's tape recorded statement was also evidence against co-defendant England (App. p.13) does not negate the use of England's statement by the prosecutor against Szenay.

II. THE DEFINITION OF "REASONABLE DOUBT" PROVIDED TO THE JURY FAILED TO CONVEY TO THE JURY THAT THEY MUST BE CERTAIN OF THE DEFENDANT'S GUILT.

At both of the beginning and end of the trial, the trial court provided the following instruction that the jury had to find Luanne Szenay guilty beyond a reasonable doubt:

> A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It's not an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that-a doubt that is reasonable, after careful and considered examination of the facts and

> circumstances of this case. (App. pp.122-123)

Due process requires that the government prove beyond a reasonable doubt every element of a charged offense. **Victor v. Nebraska** 511 U.S. 1; 114 S.Ct. 1239; 127 L.Ed.2d 583 (1994).

Any jury instruction defining "reasonable doubt" that suggests an improperly high degree of doubt for acquittal or an improperly low degree of certainty for conviction, offends due process. **Victor v. Nebraska, Idem**, 114 S.Ct. at p1254 (Blackmun, J., concurring in part and dissenting in part). (emphasis added)

While a court is not required to define "reasonable doubt," any attempt by the court to define reasonable doubt must correctly convey that concept to the jury. **Victor v. Nebraska**, 114 S.Ct. at p1243. Historically, the definition of guilt beyond a reasonable doubt has always required that the jury be certain of the defendant's guilt. By 1850 the term "moral certainty meant a state of subjective certitude about some event or occurrence." **Idem**, p1246. Thus, in instructions for at least 140 years using the "moral certainty" formulation, the message sought to be conveyed is that guilt beyond a reasonable doubt requires certainty of guilt. A brief survey of reasonable doubt instructions

indicate that courts have uniformly advised juries that proof beyond a reasonable doubt requires that the jury be "certain" or "convinced." **Brown v. Cain**, 104 F.3d 744, 754 (C.A. 5, 1997) ("if not convinced of the guilt . . . find him not guilty.") **Austin v. Bell**, 126 F.3d 843, 846 (C.A. 6, 1997) ("certainty of guilt)", **United States v. Taylor**, 66 F.3d 327 (C.A. 6, 1995) ("proof of such a convincing character," paraphrase IE Devitt & C. Blackmar, Federal Jury Practice and Instructions, Sec. 11.14 (3d ed., 1977) **Felker v. Turpin**, 83 F.3d 1303, 1309 (C.A. 11, 1996) ("moral and reasonable certainty") **United States v. Davis**, 103 F.3d 660, 669 (C.A. 8, 1996) ("proof of such a convincing nature'), **United States v. Artero**, 121 F.3d 1256, 1257-1258 (C.A. 9, 1997) ("firmly convinced of the defendant's guilt," from Federal Judicial Center, Pattern Criminal Jury Instructions 28 (1988) (Instruction 21), **Harvell v. Nagle**, 58 F.3d 1541, 1545-1546 (C.A. 11, 1995) ("abiding conviction" of guilt or truth of charge repeated at least six times).

Although the reasonable doubt instruction given is taken directly from Michigan Criminal Jury Instructions, CJI 2d, Section 3.2, the Michigan Supreme Court in **People v. Petrella**, 424 Mich. 221, 277; 30 N.W.2d 11 (1985) stated:

> . . . we remind the bench and bar once again that the Michigan Criminal Jury Instructions do not have the official sanction of this Court. Their use is not required, and trial judges are encouraged to examine them carefully before using them, in order to ensure their accuracy and appropriateness to the case at hand.

No Michigan or Federal Court has yet addressed the constitutionality of the reasonable doubt instruction contained in CJI 2d 3.2. The Michigan Court of Appeals opinion in Petitioner's Szenay direct appeal addressed this issue as follows:

> Finally, we find no error in the court's instruction of the jury regarding reasonable doubt. **People v. Sammons**, 191 Mich. App. 351; 478 N.W.2d 901 (1991) (App. p.15)

However, the Court of Appeals in **People v. Sammons**, 191 Mich. App. 351; 478 N.W.2d 901 (1991) addressed solely the omission of "moral certainty" language.

In **Cage v. Louisiana,** 498 U.S. 39; 111 S.Ct. 328; 112 L.Ed.2d 339 (1990), the jury was instructed that a reasonable doubt "must be such a doubt as would give rise to a grave uncertainty." Using language similar to that used

in the instant case that such a doubt was not a "possible doubt" the trial judge in **Cage** also said:

> A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty. (111 S.Ct. at 329)

This Court stated that, "in construing instructions, we consider how reasonable jurors could have understood the charge as a whole." **Idem** As in the instant case, the **Cage** jury had been instructed that they must find the Defendant guilty beyond a reasonable doubt. However, the Supreme Court reversed because of the erroneous instructions:

> [T]he words "substantial" and "grave" . . . suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause. **(Cage v. Louisiana, supra,** 111 S.Ct. at 329-330)

In the instruction given in Petitioner Szenay's trial, there is no reference to either a "moral certainty" or a "evidentiary certainty" or to any certainty at all, but rejection of "possible" doubt is retained, thus allowing the jury to reach a finding of guilt based on a degree of proof even lower than that disapproved of in **Cage v. Louisiana, supra.**

The definition given by the trial court that a reasonable doubt is "not an imaginary or possible doubt," because of the inclusion of the adjective "possible" required a higher degree of doubt than is constitutionally permissible. The word "possible" has been defined as:

> 1. that may or can be, exist, happen, to be done, be used, etc.: no possible cure. 2. that may be true or a fact, or may perhaps be the case, as something concerning which one has no real knowledge to the contrary: it is possible that he went. (American College Dictionary, Random House, p946)

The words "imaginary" and "possible" have totally divergent meanings. The inclusion of these two dissimilar terms in the same sentence does not alter their dissimilar definitions. While an "imaginary" doubt suggests that it is a doubt which has no basis in the evidence, a "possible" doubt can be construed by jurors as a doubt which has

some basis in fact or circumstantial evidence. Indeed, the instruction on reasonable doubt from the Federal Judicial Center, Pattern Criminal Jury Instructions 17-18 (1987) (Instruction 21) reads in part:

> If on the other hand you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty. (Emphasis added) (See **Victor v. Nebraska**, Ginsburg, J., concurring opinion, 114 S.Ct. at p1253) (emphasis added)

A "real possibility," based on the evidence, that the defendant is not guilty constitutes a reasonable doubt of the defendant's guilt. When the Szenay jury was told that they could not acquit on a "possible doubt" they were told that even if they had a doubt of the defendant's guilt, based on the evidence, such a doubt was simply a "possible doubt," and they must convict. Telling the jury that a "possible doubt" is not a "reasonable doubt" reduces the prosecutor's burden of proof to a mere preponderance of the evidence. Even a "possible doubt," based on the evidence, is insufficient to acquit if the prosecutor has introduced more evidence than the defendant.

This Court in **Victor v. Nebraska, supra**, rejected **Sandoval's** objection to the wording "not a mere possible doubt." The **Victor** opinion states that "the sense" in

which the word "possible" is used is clarified by the phrase "some possible or imaginary doubt." (114 S.Ct. at p1248-1249) However, in the **Victor** case, the **Sandoval** instruction also stated that "an abiding conviction to a moral certainty" was required before a juror can convict. The term "possible doubt" used in the context of an instruction requiring "an abiding conviction to a moral certainty" impresses on the jury that a doubt which does not disturb their "abiding conviction" of guilt, is just a "mere possible doubt." In the reasonable doubt instruction given to the Szenay jury, the jury is not told that they must have a "abiding conviction to a moral certainty" before they convict, and therefore this context which would be helpful in defining a "possible doubt" is missing.

The instruction given at Petitioner Szenay's trial allowed he jury to find that a "possible doubt," even if based on the evidence, was not a "reasonable doubt," while at the same time the jury was not told that they should be convinced of the defendant's guilt. Thus, the jury, following the court's instructions, could convict without certainty of guilt, while authorized to reject doubt of guilt based on the evidence.

CONCLUSION.

For the reasons stated, the Petition for a Writ of Certiorari, should be granted.

Respectfully submitted
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No. 98-1138
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LUANNE SZENAY,

Petitioner-Appellant,
v.

JOAN YUKINS and WARDEN OF SCOTT CORRECTIONAL FACILITY,
Respondent-Appellee

On Appeal from the United States District Court for the Eastern District of Michigan

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Before: MERRITT, GUY, and MOORE, Circuit Judges.

Ralph B. Guy, Jr., Circuit Judge. Petitioner, Luanne Szenay, appeals from the district court's denial of her petition for a writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254, following her state court convictions on charges of first degree murder and conspiracy to commit first degree murder. Luanne Szenay was convicted by a jury after a joint trial with co-defendant Shawn England. While neither she nor England testified, their co-conspirator James Blau testified pursuant to a plea agreement. On appeal, Szenay argues that the admission of

the statement by England, her non-testifying co-defendant, violated her rights under the Confrontation Clause and was not harmless error. Szenay also argues that the jury instruction on the burden of proof violated her due process. We find no error and affirm.

I.

Szenay's convictions arose out of the murder of her husband Tim Szenay, on January 18, 1990. Luanne and Tim Szenay, owners of the Health Nut Store in Bay City, Michigan, had marital difficulties and had filed for divorce. Luanne made statements to several people in the months before the murder that suggested she wanted to kill her husband. In mid-December 1989, Jim Blau was hired by Luanne Szenay as a bodyguard and to help her with the store. Although Jim and Luanne worked together a lot, Blau had met Tim Szenay only once before the murder. Luanne told Blau about her relationship with her husband and said there had been threats and violence in her marriage.

Jim Blau testified that during the second week in January 1990 Luanne told him about a fight she had with her husband. After that, Luanne told Blau that her life was in shambles because of Tim and she would be better off if he were "not around." They had several conversations about the subject, and Luanne said she had thought about

killing Tim, but had not done so because of her religion. Blau had offered to find someone to kill him and Luanne suggested it should look like a suicide. Luanne told Blau that Tim had a $300,000 life insurance policy. Blau asked for ten percent of the insurance money to arrange to have Tim Szenay killed, and Luanne agreed. On January 16, two days before the murder, Luanne called the insurance company to check on the status of the policy, telling the agent that she wanted to know because they were getting a divorce. At some point in time, she also discovered that the insurance policy did not cover suicide.

Blau and Luanne met and talked about whether she was serious about killing her husband and about his habits, including his drug abuse Blau said he would need money to bring in a friend from out of state and Luanne gave him $350. Jim Blau purchased a plane ticket for Shawn England to travel from Florida to Michigan. Timothy Blau, Jim's brother, was present when the ticket was purchased, and testified that he was in the car when Luanne gave Jim instructions on how to find Tim Szenay. Jim Blau testified that after England arrived in Saginaw, they purchased a shotgun with money from Luanne Szenay.

On January 18, 1990, Jim Blau borrowed a car and drove to Bay City with England. They went to several

houses looking for Tim Szenay, and, when he could not be found, Blau called Luanne to see if she might know where to find him. At Luanne's suggestion, they went to another family member's house, where England asked to talk to Tim Szenay about renting a room. The victim's sister testified that a young man came to her door asking just that, but Tim Szenay was not there at the time.

That night Blau and England went to Tim Szenay's house. When England fired the first shot from outside the house, Szenay started to run. Blau ran to the front door of the house, caught Szenay, and pushed him into the kitchen where England shot him. Blau and England drove back to Midland and arrived about 10 p.m. at the Rockin' Round-Up Bar where Blau worked. Blau started working and England went to the hotel, with instructions to burn the map and anything else Luanne might have given them. At about 11 p.m., Blau telephoned Luanne's apartment from the bar's office telephone, told Luanne that her husband was dead, and asked for money so England could go back to Florida. The telephone records confirmed that two calls were made from the Rockin' Round-Up Bar to Luanne's apartment at 11:14 and 11:15 p.m. that night.

The next day, Blau went to the home of Mario and Carmen Garcia, with whom Luanne was staying. Blau had

been told he would find money in the ashtray of a car parked outside the Garcias' residence. Mr. Garcia testified that he confronted a man looking around in the car, and when he told Luanne about it she said the person needed some papers before going off to college in Florida. Blau testified that he did not find any money in the car. Kim Tessin, a friend of Jim Blau, testified that she lent $500 to Blau so he could sent England back to Florida. Blau paid her back a few days later with five $100 bills.

On January 20, Jim Blau went to Bay City to talk to Luanne, and she gave him eight $100 bills. Blau then moved to Florida and Luanne sent him a few hundred dollars and later sent a package with $1,000. The package containing ten $100 bills and a letter was sent to his place of work, US K-9 Security, and was seen by his employer.

On March 2, 1990, a search warrant was executed at the Health Nut Store, and two hours later another warrant was executed at Luanne's apartment. The detectives testified that Luanne said she knew they were coming because she had been called by her attorney. There was the odor or something burning when they arrived, ashes were found in the bathroom, and the candle that Luanne said had been burning was neither warm nor soft to the touch. Detectives found a large white envelope in the trash

dumpster addressed to Luanne Szenay with Jim Blau's return address on it.

Jim Blau pleaded guilty to second degree murder, conspiracy to commit murder, and escape from lawful custody. He testified at the joint trial of Luanne Szenay and Shawn England. Both were convicted of first-degree murder. Szenay was also convicted of conspiracy to commit first-degree murder, and England pleaded guilty to escape from custody. Szenay was sentenced to a mandatory term of life imprisonment without the possibility of parole. The appeals of Szenay and England were consolidated and the Michigan Court of Appeals affirmed their convictions, specifically ruling in part:

> We also reject defendant Szenay's claim that reversal is mandated because the court erred in admitting portions of England's confession as evidence against her as well as evidence of England's escape from jail. Evidence regarding the escape was irrelevant and thus not prejudicial to Szenay and any error in the admission of England's confession was harmless given admission of the third coconspirator's confession.

(J.A. at 15.) (*People v. Szenay*, No. 138992 (Mich. Ct. App. May 23, 1995)). Luanne Szenay's application for leave to appeal to the Michigan Supreme Court was denied, *People v. Szenay*, 546 N.W.2d 255 (Mich. 1996), as was

her petition for a writ of certiorari to the United States Supreme Court, *Szenay v. Michigan*, 117 S.Ct. 383 (1996).

Luanne Szenay, represented by counsel, filed this petition for habeas corpus on January 29, 1997. After consideration of the issues presented, the magistrate judge recommended that her application be denied. Despite her objections, the district court adopted the magistrate judge's report and recommendation and denied the petition for a writ of habeas corpus, *Szenay v. Yukins*, C.A. No. 97-70363-DT (E.D. Mich. Dec. 23, 1997). Szenay filed this appeal, and the district court granted her request for a certificate of appealability. *See* 28 U.S.C. § 2253 and FED R. APP. P. 22(b).

II.

The standard for reviewing habeas corpus petitions under 28 U.S.C. § 2254 has been significantly changed for petitions filed after April 24, 1996, by the amendments adopted in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* 28 U.S.C. § 2254(d) (Supp. 1997); *Lindh v. Murphy*, 521 U.S. 320 (1997) (changes apply to cases filed after April 24, 1996). Pursuant to the amended provisions of § 2254 (d), a writ of habeas corpus may not be granted unless the state court proceedings.

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of,

> clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

28 U.S.C. § 2254(d)(1)-(2) (Supp. 1997). Further "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). This court recently discussed the amended provisions in *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998), stating that:

> Under the AEDPA, the district court could find the state court determinations unreasonable "only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists."

(Quoting *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996), *cert. Denied*, 177 S. Ct. 1114 (1997)). We review *de novo* the district court's denial of habeas corpus relief. See *Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1044 (1998).

A. Confrontation Clause

Szenay argues that the district court erred when it held that the state court did not unreasonably apply United States Supreme Court law in determining that the admission of co-defendant England's out-of-court statement did not violate her Sixth Amendment right to confront witnesses against her. We disagree.

England's tape-recorded statement, which was admitted over objections, recounted in significant detail his involvement in the planning and execution of the murder. England also implicated Luanne Szenay indirectly by stating that (1) Blau told him that Szenay wanted her husband dead and would pay them to do it; (2) he believed it was Szenay who told Blau where to find the victim; (3) he believed Blau called Szenay for more money before the murder; (4) he burned the map that Szenay made for Blau and the telephone number to her apartment; and (5) Blau told him that Szenay would give him money for both the plane ticket and so that Blau could pay for a place to live in Florida. While Blau was subject to cross-examination, England did not testify at trial.

In *Idaho v. Wright*, 497 U.S. 805 813 (1990), the Court held that the Confrontation Clause "does not necessarily prohibit the admission of hearsay statements

against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause." The out-of-court statement of Szenay's non-testifying co-defendant would be admissible only if it bears adequate "indicia of reliability," which can be inferred without more in a case where the hearsay statement fails within a "firmly-rooted" hearsay exception or when it is supported by "particularized guarantees of trustworthiness." *Id.* at 815, 816-17 (*reaffirming Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

As the district court found in adopting the magistrate judge's report and recommendation, the Supreme Court has not recognized the declaration-against-penal-interest exception to the hearsay rule to be a "firmly-rooted" exception for purposes of the Confrontation Clause. *See Williamson v. United States*, 512 U.S. 594, 605 (1994) (separate opinion of O'Connor, J., Part II C, "we need not decide whether the hearsay exception for declarations against interest is 'firmly rooted'"); *Lee v. Illinois*, 476 U.S. 530, 543-4 n.5 (1986). As a result, the statement could not be admitted at Szenay's trial unless there were "particularized guarantees of trustworthiness" under the totality of circumstances that surrounded the making of the statement and that rendered the declarant worthy of belief.

The inherent trustworthiness of the statement must be determined without regard to the other evidence at trial. Rather, corroborating evidence more appropriately indicates that any error in admitting the statement might be harmless. *See Wright*, 497 U.S. at 820, 822-23.[1]

We find that it was not unreasonable for the state court to conclude that the totality of circumstances surrounding the making of the statements by England bear sufficient indicia of reliability to permit the admission of England's tape-recorded statements against Szenay even in the absence of an opportunity for cross-examination. The statements of England were truly self-inculpatory. *See Earnest v. Dorsey*, 87 F.3d 1123 (10th Cir. 1996). England admitted that he came to Michigan at the request of Blau to murder Szenay's husband, participated with Blau in the planning of the murder, and fired the shots that killed the victim. As part of his confession, England related his understanding that Szenay waned her husband dead and would pay them to do it. England provided substantial detail in his confession concerning the events leading up to

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[1] Although this court has indicated that the penal interest exception of Fed. R Evid. 804(b)(3) is a "firmly-rooted" hearsay exception, *see Newman v. Rivers*, 125 F.3d 315, 319-20 n.1 (6th Cir.), *cert denied*, 118 S. Ct. 631 (1997), amended § 2254(d) requires that we consider the habeas petition in relation to federal law as determined by the Supreme Court.

and including the murder which would be difficult to fabricate.

In fact, England made no attempt to minimize his own role through his inclusion of Szenay. While Szenay speculates that the police told England she had implicated him, England's statements relating to Szenay do not suggest that they were the product of an attempt to "shift or spread blame, curry favor, avenge himself, or divert attention to another." *Lee*, 476 U.S. at 545. *Compare Crespin v. State of New Mexico*, 144 F.3d 641 (10th Cir.), *cert. denied*, 119 S. Ct. 378 (1998) (co-defendant's hearsay statement, which attempts to sift blame and dilute her own involvement in stabbing, runs afoul of the considerations in *Lee*), *with United States v. Canan*, 48 F.3d 954, 963-65 (6th Cir. 1995) (Nelson, J., opinion of the court as to Part IV B) (admission of deathbed statements did not violate the Confrontation Clause).

Finally, the state court found that even if England's out-of-court statements implicating Szenay were admitted in error, it was harmless error. In assessing Confrontation Clause errors, we must consider the importance of the testimony to the entire case, whether the testimony was cumulative, whether corroborating or contradictory evidence existed, and the overall strength of the

government's case. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). Acknowledging that Blau was subject to cross-examination, Szenay nonetheless argues that it would not have been believed in the absence of England's statement. Blau indicated, by way of an affidavit filed in his own criminal case, that he was induced to plead guilty and to testify as part of the plea agreement because he understood that in all likelihood he would only serve 15 to 20 years in prison. As the district court noted, however, Blau's affidavit in no way suggests that his testimony was false, nor does it negate the fact that Blau was subject to impeachment on account of his plea agreement during Szenay's trial. Significantly, Blau's testimony corroborated the statements that England's confession attributed to him as well as the conduct England described. Finally, Szenay also emphasizes that the jury asked that the tape of England's statement be replayed during its deliberations, but fails to note that the tape was also offered against England, who was convicted of first-degree premeditated murder and did not testify on his own behalf at trial.

Not only were England's out-of-court statements regarding Szenay cumulative, but also other corroborating evidence (1) suggested that Szenay wanted to murder her

husband; (2) tied her to Blau and the murder plans; and (3) confirmed the contacts between her and Blau in the days before and after the murder. We find that even if the admission of England's statements concerning Szenay was erroneous, the error was harmless in light of the statements themselves, the extent of corroborating evidence to support them, and the strength of the prosecution's case against her. Thus, the state court's conclusion that any error was harmless was neither unreasonable nor clearly incorrect.

B. Jury Instructions on Reasonable Doubt

Szenay argues that the instruction defining "reasonable doubt" failed to properly instruct that jury and, consequently, violated her right to due process. The state court of appeals rejected this claim and the district court denied habeas relief on this issue. There is no dispute that the jury was instructed, in accordance with § 3.2 of the Michigan Standard Criminal Jury Instructions (Second), as follows:

> A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that – a doubt that is reasonable, after a careful and considered examination of the facts and circumstances of this case.

(J.A. at 370-71.) Counsel for England objected to the instruction.

Szenay argues that the instruction was erroneous because it (1) described reasonable doubt as "not an imaginary or possible doubt," (2) defined reasonable doubt in a circular manner as "a doubt that is reasonable," and (3) failed to instruct the jury concerning the "certainty" required in order to convict her. We disagree.

> To warrant habeas relief, jury instructions must not only have been erroneous, but also, taken as a whole, so inform that they rendered the entire trial fundamentally unfair. If an instruction is ambiguous and not necessarily erroneous, it violates the Constitution only if there is a reasonable likelihood that the jury has applied the instruction improperly.

Austin v. Bell, 126 F.3d 843, 846 (6th Cir. 1997), *cert. denied*, 188 S. Ct. 1547 (1998) (citations omitted).

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358 (1970). The Supreme Court has explained, however, that "the Constitution does not require that any particular form of words be used in advising a jury of the government's burden of proof." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). In *Victor*, the Court rejected a challenge to an instruction

that a reasonable doubt is not a mere possible doubt. *See also United States v. Delpit*, 94 F.3d 1134, 1148 (8th Cir. 1996) (repeatedly rejected challenges to "mere possibility of doubt" language). Likewise, the circularity in defining a reasonable doubt as a doubt that is reasonable, does not render the instruction constitutionally infirm. *See Murphy v. Holland*, 776 F.2d 470, 476 (4th Cir. 1985), *vacated on other grounds*, 475 U.S. 1138 (1986).

Finally, counsel for England asked that the instructions include language from the first edition of the standard criminal jury instructions about "hesitation, moral certainty and things of that nature." Both the Supreme Court and this court have held that, although use of the phrase "moral certainty" is disfavored, the inclusion of the phrase does not necessarily result in an error of constitutional magnitude. *See Victor*, 511 U.S. at 22; *Austin*, 126 F.3d at 846. In *Cage v. Louisiana*, 498 U.S. 39, 41 (1990), the Court found that the instruction equating a reasonable doubt with "grave uncertainty" and "actual substantial doubt" coupled with the phrase to a "moral certainty," impermissibly suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard.

We find that the instructions in this case adequately instructed the jury that they could convict only if the prosecution proved guilt beyond a reasonable doubt and that its decision had to based on careful examination of the evidence. Despite the failure to include direction to the jury on the certainty required to convict, the instructions did not improperly suggest the jury could convict on a lower burden of proof, and the state court's decision was not unreasonable in finding no error in this regard.

AFFIRMED.[2]

KAREN NELSON MOORE, Circuit Judge, concurring in the result. I would hold that the admission of England's out-of-court confession violated Szenay's rights under the Confrontation Clause. I agree with my colleagues that any error in this regard was harmless, however, and thus I concur in affirming the district court's denial of the writ of habeas corpus.

As the majority correctly concludes, the admissibility of England's confession turns on whether the

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[2] While we have specifically approved the language in the Sixth Circuit's standard jury instruction that defines proof beyond a reasonable doubt to include the kind of proof that is so convincing that one would not hesitate to rely and act on it in making the most important decisions, *see United States v. Goodlett*, 3 F.3d 976, 979 (6th Cir. 1993), we did not hold that failure to include language of hesitation would render the instruction unconstitutional.

totality of the circumstances surrounding its making exhibited particularized guarantees of trustworthiness that render England worthy of belief. *See Idaho v. Wright*, 497 U.S. 805, 820 (1990). In *Lee v. Illinois*, 476 U.S. 540, 545 (1986), the Supreme Court explained that "a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." The Court has subsequently reemphasized this concerning noting that "the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability." *Williamson v. United States*, 512 U.S. 594, 600 (1994).

England was in custody when he gave the police his confession. The post-arrest, custodial setting causes the incrimination of a codefendant to be highly suspect. *See Fuson v. Jago*, 773 F.2d 55, 61 (6th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). Although he stated that he was promised only that he would receive fair treatment, we cannot reject the possibility that England was attempting to spread the blame, curry favor, or avenge himself on Szenay when he implicated her. Even though England was not

attempting to shift responsibility for pulling the trigger, the motivation to spread blame or curry favor is generally present in this situation. *See Williamson*, 512 U.S. at 604 ("A reasonable person in [England's] position might even think that implicating someone else would decrease his practical exposure to criminal liability . . ."). Moreover, while we do not know what transpired between the Florida police and England prior to his confession, Blau testified that upon his arrest the Florida police told him that Szenay had implicated him, Blau, in the murder. If the police used the same tactic against England, revenge could have motivated his incrimination of Szenay.

England's statements incriminating Szenay did little or nothing to further implicate England. England confessed to having shot Tim Szenay in the back with a shotgun while Blau held the victim down. England's description of, inter alia, his conversations with Blau before the murder, his flight from Florida to participate in the killing, and the purchase by the two men of the shotgun used to kill Tim Szenay more than adequately established the conspiracy count against England. England's statements regarding Szenay provided the motive for the conspiracy, explained the source of the cash used to purchase the shotgun and plane tickets, and, of course, implicating Szenay in the

murder and the conspiracy, but, since he was prepared to confess to his activities with Blau, England's statements implicating Szenay did not sufficiently subject England to criminal liability to create the inference that England would not have made these statements unless he believed them to be true. *See* Federal Rule of Evidence 804(b)(3). Accordingly, I conclude that England's confession was not admissible against Szenay, and I concur only in the result.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Lu Anne Szenay,

Petitioner — Case No. 97-70363

v. — Hon. Nancy G. Edmunds

Joan Yukins,

Respondent.

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ORDER ACCEPTING MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

This matter has come before the Court on the Magistrate Judge's October 9, 1997 Report and Recommendation. Being fully advised in the premises and having reviewed the record and the pleadings, including Petitioner's Objections and two supplemental Objections, the Court hereby ACCEPTS AND ADOPTS the Magistrate Judge's Report and Recommendation.

Petitioner asserts that "the language 'abiding conviction' [of defendant's guilt] properly state[s] the appropriate reasonable doubt burden of proof," and that because the trial judge's instruction does not contain such language, it is erroneous. Petitioner's Supplemental Brief in Support of Objections to the Report and

Recommendation of the Magistrate Judge, 2; cf. Petitioner's Objections, 11.[1] The trial judge gave he following instruction:

> A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It's not an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that - - a doubt that is reasonable, after careful and considered examination of the facts and circumstances of this case.

Petitioner's Objections, 10 (citations omitted). The instruction defines the doubt needed for acquittal and does not address the degree of certainty or conviction needed for a determination of guilt; despite Petitioner's arguments to the contrary, language regarding "abiding conviction" is not necessarily an inherent part of a valid reasonable doubt standard.[2] See Victor, 114 S.Ct. at 1251 ("Though we

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[1] In her Supplemental Brief in Support of Objections to the Report and Recommendation of the Magistrate Judge, Petitioner relies primarily on Austin v. Bell, 126 F.3d 843 (6th Cir. 1997) (decided a few days before the Magistrate issue his Report and Recommendation) in support of her contention that the trial judge's instruction regarding reasonable doubt is erroneous.

[2] The case law which Petitioner cites emanates from instructions which attempted to quantify the degree of certainty needed to pronounce a defendant guilty. See, e.g., Austin v. Bell, 126 F.3d 843, 846 (6th Cir. 1997) (finding that the "phrase 'moral certainty' is constitutionally permissible where the rest of the instruction 'lends content to the phrase' " (citations omitted)). Therefore, the instructions at issue in Petitioner's cites are not comparable to that presently before the Court.

reiterate that we do not countenance its use, the inclusion of the moral certainty phrase did not render the instruction given in Victor's case unconstitutional."). As Petitioner notes, it is the concept of reasonable doubt which proves pivotal, see Petitioner's Objections, 16, and which should be (and was) addressed. See In re Winship, 397 U.S. 362, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). This Court, therefore, concurs with the Magistrate's holding that the trial judge did not err in (focusing on and) defining "reasonable doubt" as he did. See Magistrate's Report and Recommendation, 15.

Nor does Petitioner's Second Supplemental Brief in Support of Objections to Magistrate's Report and Recommendation sway this Court. In this pleading,

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The focus in Victor and Cage on defining the degree of certainty needed to convict does *not* suggest Petitioner's conclusion that the absence of any language regarding certainty renders an instruction inadequate. See Victor v. Nebraska, 114 S.Ct. 1239, 1250-51 (1994) (finding constitutional an instruction containing a 'moral certainty' segment, because the rest of the insurrection provided sufficient context to lend meaning to the phrase); Cage v. Louisiana, 111 S.Ct. 328, 329 (1990) (finding that where an instruction "equated a reasonable doubt with a 'grave uncertainty' and an 'actual substantial doubt,' and stated that what was required was a 'moral certainty' "the instruction

Petitioner essentially argues that James Blau's testimony is not credible because he "was testifying pursuant to a substantial inducement for his testimony, and was imminently impeachable." Petitioner's Second Supplemental to Brief in Support 2. (Petitioner submits Blau's affidavit to demonstrate that Blaus' testimony was based upon a "substantial promise of leniency," which he probably will not receive.[3]) Petitioner asserts that because Blau's testimony (allegedly) is not credible, it does not provide sufficient basis for the admission of the statement by England, a non-testifying co-defendant. Therefore, Petitioner concludes, admission of England's statement was unconstitutional and its admission constituted harmless error. Id. at 2-3.

The Court rejects Petitioner's argument. First, Blau does not aver that his testimony was false; he only states that he would not have given it had he more fully understood the consequences of his plead. His credibility, therefore, is not impinged. Second, the fact that Blau now thinks that he may get at least ten more years than he

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"suggested a higher degree of doubt than is required for acquittal under the reasonable-doubt standard").

[3] Specifically, Blau believed that he would get out of prison in less than twenty years, but he subsequently has developed the "perception" that inmates convicted of "murder 2d offenses" usually serve "30 or more years" or are not paroled. See Blau Affidavit, ¶¶ 7-8.

bargained for does not alter the fact that Petitioner could have impeached Blau during the trial by referring to his plea bargain. Third, on reviewing the trial transcript, the Court concludes that England's testimony (as reinforced by Blau's) was not the only evidence of Petitioner's guilt. Therefore, the determination of the Michigan court of appeals' "that any error in the admission of [] England's statement was harmless was not contrary to, nor an unreasonable application of, [] existing Supreme Court precedent." See Magistrate's Report and Recommendation, 10; cf. id. at 3-5 (delineating the proper standard of review).

The Court hereby ADOPT AND ACCEPTS the Magistrate's Report and Recommendation. It is further ordered that Petitioner's application for writ of habeas corpus is DENIED.

SO ORDERED.

Nancy G. Edmunds
U.S. District Judge

Dated: December 23, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Lu Anne Szenay,

Petitioner Case No. 97-70363

v. Hon. Nancy G. Edmunds

Joan Yukins, Magistrate Judge Paul J. Komives

Respondent.

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REPORT AND RECOMMENDATION

I. RECOMMENDATION: The Court should deny petitioner's application for the writ of habeas corpus.

II. REPORT:

A. *Procedural History*

1. Petitioner Lu Anne Szenay is a state prisoner, currently confined at Scott Correctional Facility in Plymouth, Michigan.

2. On January 10, 1991, petitioner was convicted of conspiracy to commit first degree murder in violation of MICH. COMP. LAWS § 750.157 a and first degree murder in violation of MICH. COMP. LAWS § 750.316, following a jury trial in Bay County Circuit Court. On February 19, 1991, she was sentenced to a mandatory term of non-parolable life imprisonment.

3. Petitioner, represented by counsel, appealed as of right to the Michigan Court of Appeals, raising the following claims:

I. THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN ADMITTING OVER DEFENSE OBJECTION THE CONFESSION OF THE CODEFENDANT, WHICH INCRIMINATED DEFENDANT LUANNE SZENAY, PARTICULARLY BECAUSE THE JUDGE RELIED UPON THE COURT OF APPEALS OPINION IN WATKINS, WHICH WAS LATER REVERSED BY THE SUPREME COURT.

II. WHERE DEFENDANT LUANNE SZENAY WAS TRIED FOR THE MURDER AT THE SAME TIME AS THE ALLEGED SHOOTER, SHAWN ENGLAND, AND WHERE JIM BLAU WAS A MAJOR PROSECUTION WITNESS WHO ADMITTED HIS PARTICIPATION IN THE MURDER, SHE WAS PREJUDICED AND THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN ADMITTING EVIDENCE THAT ENGLAND AND BLAU ESCAPED FROM THE COUNTY JAIL AND WERE RECAPTURED.

III. WHERE DEFENDANT AND LUANNE SZENAY WAS PREJUDICED BY THE ADMISSION AGAINST HER OF EVIDENCE THAT SHOULD ONLY HAVE BEEN ADMISSIBLE AGAINST HER CODEFENDANT, THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENSE MOTIONS TO SEVER THE TRIALS OF SZENAY AND HER CODEFENDANT.

IV. DEFENDANT LUANNE SZENAY'S CONVICTIONS SHOULD BE REVERSED BECAUSE OVER DEFENSE OBJECTION THE TRIAL JUDGE IMPROPERLY INSTRUCTED THE JURY ON THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT FROM THE LEGALLY INADEQUATE SECOND EDITION OF THE CRIMINAL JURY INSTRUCTIONS, INCLUDING INSTRUCTING THAT A REASONABLE DOUBT IS NOT A "POSSIBLE DOUBT" AND NOT INSTRUCTING THAT THE JURORS MUST FIND GUILT TO A MORAL CERTAINTY.

The court of appeals found that the trial court's denial of the co-defendants' motion to sever and its instruction on reasonable doubt were not erroneous. The court also fund that petitioner was not prejudiced by the admission of her

co-defendant's confession or by evidence of her co-defendant's escape from custody. Accordingly, the court of appeals affirmed petitioner's conviction. *People v. Szenay*, No. 138992 (Mich. Ct. App. May 23, 1995).

4. Petitioner sought leave to appeal these issues to the Michigan Supreme Court. On March 26, 1996, the Supreme Court denied the application for leave to appeal. *People v. Szenay*, 451 Mich 852, 546 N.W.2d 255 (1996).

5. Petitioner then filed a petition for writ of *certiorari* in the United States Supreme Court. On November 4, 1996, the Court denied *certiorari*. *Szenay v. Michigan*, 117 S. Ct. 383 (1996).

6. Petitioner, represented by counsel, filed the instant petition for habeas corpus on January 29, 1997. She raises two grounds for the writ of habeas corpus: (1) denial of her Sixth Amendment right of confrontation by the admission of her codefendant's incriminating statements; and (2) denial of due process by the trial court's erroneous instruction on the reasonable doubt standard.

7. Respondent filed her answer on August 11, 1997. She contents that petitioner's claims are without merit.

B. *Standard of Review*

Because petitioner's application was filed after April 26, 1996, her petition is governed by the provisions of the recently enacted Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Publ L. NO. 104-132, 110 Stat. 1214 (Apr. 26, 1996). Amongst other amendments, the AEDPA amended the substantive standards for granting habeas relief by providing:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - -
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Subsection (d)(1) deals with habeas challenges based on errors of law or mixed questions of law and fact, while subsection (d)(2) applies to challenges based on purely factual errors. See *Gomez v. Acevedo*, 106 F.3d 192, 199 & n.7 (7th Cir. 1997); *Dukes v. Hunt*, 952 F. Supp. 276, 281

(E.D.N.A. of 1996); *Thomas v. Gramley*, 961 F.Supp 1338, 1341-42 (N.D. Ill. 1996). Under subsection (d)(1), a petitioner will be entitled to relief only if the state court's decision of a purely legal issue was contrary to clearly established law as decided by the Supreme Court, or if the court's application of that law to the facts was unreasonable. *See Gomez*, 106 F.3d at 199; *Drinkard v. Johnson*, 97 F.3d 751, 768-69 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997); *Thomas*, 951 F. Supp at 1341-42. This standard is more deferential than the pre-AEDPA standard. *Stone v. Farley*, 86 F.3d 712, 716 n.3 (7th Cir. 1996). As the Fifth Circuit recently explained, with respect to purely legal determinations the question is whether the state "court correctly determined the law applicable to [petitioner]'s claim[.]" *Drinkard*, 97 F.3d at 768. With respect to the state court's application of he law to the facts, the Fifth Circuit explained:

> This "unreasonable application" standard of review of a state court decision must mean more than that a federal court may grant habeas relief based on its simple disagreement with the state court decision; this would amount to nothing more than a *de novo* review. The use of the word "unreasonable" in formulating this restrictive standard of review implicitly denotes that federal courts must respect all *reasonable* decisions of state courts. Thus,

> given the statutory language, and in light of the legislative history that unequivocally established that Congress meant to enact deferential standards, we hold that an application of law to facts is *unreasonable* only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.

Drinkard, 97 F.3d at 768-69, accord *Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996) (en banc) ("[W]hen the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored. By posing the question whether the state court's treatment was 'unreasonable,' § 2254(d)(1) requires federal courts to take into account the care with which the state court considered the subject.") *rev'd on other grounds*, 117 S. Ct. 2059 (1977). [1]

Similarly, under subsection (d)(2) a federal court reviewing purely factual determinations may grant the writ

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[1] In examining whether the state court's decision was one of the types specified in subsection (d)(1) for granting the writ, the Court "remain[s] free to look beyond those cases and reasons relied upon by the state court opinion in determining whether the standards for issuance of the writ set forth in § 2254 (d)(1) have been met." *Thomas*, 951 F. Supp. at 1342.

of habeas corpus only where the state court's determinations are "unreasonable." Although no case has directly discussed what constitutes an "unreasonable" factual determination, the "unreasonable application" language of subsection (d01) is analogous. Thus, a factual determination will be unreasonable only where it "is so clearly incorrect that it would not be debatable among reasonable jurists." *Drinkard*, 97 F.3d at 768-69; *see also*, 28 U.S.C. § 2254 (e)(1) (formerly § 2254 (d)) (state court findings of fact are presumed to be correct, and this presumption may only be rebutted by clear and convincing evidence). After applying these standards, the Court should conclude that petitioner is not entitled to the writ of habeas corpus.

C. *Analysis*

Petitioner was tried for, and convicted of, murdering her husband. The evidence at trial showed that petitioner indicated her desire to ill her husband to Jim Blau, a friend and employee of petitioner. Trial Tr., Vol. XI, at 131-137 (testimony of Jim Blau). She promised to give Blau $30,000.00 from a $300,000.00 life insurance policy on her husband if he could arrange for her husband to be killed. Trial Tr., Vol. XI, at 138. Blau contacted Shawn England, petitioner's codefendant. Blau purchased

a ticket for England to come to Michigan from Florida. Trial Tr., Vol. XI, at 143-144; Vol. VI, at 199-203. Blau picked up England in Saginaw and drove him to bay City, where the victim lived. The day prior to the murder, Blau and England purchased a shotgun with money to give them by petitioner. Trial Tr., Vol. XI, at 147; Trial Tr., Vol. IV, at 94-122. On the night of the murder Blau and England drove to a house where the victim was living. England went up to the front window and fired the gun. The victim attempted to flee through a window. Blau prevented him from doing so, and pushed the victim into the kitchen, where England shot him. Trial Tr., Vol. XI, at 161-63. Blau and England returned to Midland, where England was staying. Blau went to the Round Up bar, where he phoned petitioner. Trial Tr., Vol. XI, at 167, Trial Tr., Vol VI, at 142-44; Trial Tr., Vol. VII, at 152. Blau and England subsequently received several small payments from petitioner. Trial Tr., Vol. XI, at 171-173; Trial Tr., Vol. VI, at 133-42, 152-56; Trial Tr., Vol. IV, at 147-51. On March 2, 1990, the police executed a search warrant at petitioner's home and place of business, at which time she was arrested. Trial Tr., Vol X, at 202-18. On March 3, 1990, England was arrested in Florida, at which time he gave a statement to the police confessing to the murder.

Pet. for Writ of Habeas Corpus, Ex. 2, Transcript of Police Questioning of Shawn England [hereinafter "England Tr."].

1. *Admission of Statement of Non-Testifying Codefendant*

Petitioner first claims that she was deprived of her Sixth Amendment right to confront the witnesses against her by the admission of England's out-of-court statement to the police. The Sixth Amendment provide, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. CONST. Amend. VI. In *Bruton v. United States*, 391 U.S. 123 (1968), the Court held that, in certain instances, the admission into evidence of a non-testifying codefendant's confession violates a defendant's right to confront the witnesses against him. *Id.* at 136-37. In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Court explained that the underlying purpose of the Confrontation Clause is similar to that of the hearsay rule, *i.e.*, to exclude unreliable, out-of-court statements in criminal proceedings. Thus, the Courts reasoned:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability

> can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded , at least absent a showing of particularized guarantees of trustworthiness.

Roberts, 448 U.S. at 66.

Petitioner argues that England's confession did not come within a "firmly rooted hearsay exception," not did it show any other "indicia of reliability." Accordingly, petitioner argues, the admission of the statement into evidence violated the Confrontation Clause. As petitioner correctly notes, the "statement against penal interest" exception to the hearsay rule is not a firmly rooted exception establishing the reliability of a codefendant's statement. *Lee v. Illinois*, 476 U.S. 530, 544 n.5 (1986). However, the *Lee* Court further noted that, even if the confession of a codefendant does not fall within a firmly rooted exception to the hearsay rule, "it may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness.'" *Lee*, 476 U.S. at 543 (quoting *Roberts*, 448 U.S. at 66).

This case, however, is distinguishable from *Lee*. In *Lee*, the Court reasoned that "a codefendant's confession is

presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Lee*, 476 U.S. at 545. An examination of England's shows that these concerns are not implicated here. England stated that he was not confessing based on any threats or promises. England Tr. At 1. Further, although the confession implicates petitioner as being the one who hired him, England took full responsibility for firing the shot that killed the victim. England Tr. At 9-12. The Tenth Circuit's recent decision in *Earnest v. Dorsey*, 87 F.3d 1123 (10th Cir.), *cert. denied*, 117 S. Ct. 527 (1996), is directly on point. In *Earnest*, the Court found that the non-testifying codefendant's confession bore sufficient indicia of reliability in circumstances similar to those present in this case:

> Even without consideration of the trial evidence corroborating Boeglin's statement, however, we find the statement reliable, as it bears other important indicia of reliability. First, the statement was strongly against Boeglin's penal interest. We are mindful that in *Lee*, the Supreme Court found an accomplice's confession unreliable, and, as noted above, stated that the concept of a declaration against penal interest "defines too large a class for meaningful

> *Confrontation Clause analysis.*" Accordingly, in light of *Lee* we view a hearsay statement's adverse effect on the declarant's penal interest not as dispositive of reliability, but as "one factor entitled to some consideration."
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> . . . .
>
> In addition to being "truly self-inculpatory," we find the statement describes the crime at a level of detail which would be difficult to render in a fabricated admission. Moreover, the record discloses no evidence that Boeglin was threatened or coerced by law enforcement officers when he made the statement; rather, Boeglin appears to have made the statement voluntarily. Finally, we find no error in the magistrate's factual findings, nor any evidence to rebut the state court's factual findings, that Boeglin was offered no leniency in exchange for his statement, that at the time of the statement the act Boeglin confessed to was thought to have caused the victim's death, that Boeglin had no reason to retaliate against Earnest, and that Boeglin was not unduly agitated when he made the statement. We agree that these factors, taken together with the other factors discussed above, are sufficiently indicative of the statement's reliability. We therefore conclude that the admission of Boeglin's statement against Earnest did not violate the Confrontation Clause.

Earnest, 87 F.3d at 1133-34 (citations omitted); *cf. Williamson v. Unites States*, 512 U.S. 594, 603 (1994)

(discussing FED. R. EVID. 804, noting: "there are many circumstances in which Rule 804(b)(3) dos allow the admission of statements that inculpate a criminal defendant. Even the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor."); *United States ex re. Gooch v. McVicar*, 953 F. Supp. 1001, 1008-09 (N.D. Ill. 1997). This reasoning is directly on point. Accordingly, the admission of England's statement to the police was not contrary to, nor an unreasonable application of, existing Supreme Court precedent.[2]

Furthermore, even if the admission of the statement was in error, the Michigan Court of Appeals found this error to be harmless "given admission of the third coconspirator's [Blau's] confession." *People v. Szenay*, No. 138992, at 2 (Mich. Ct. App. May 23, 1995). In *Lee*, the Supreme Court noted that, even though there may be constitutional error in the admission of a non-testifying codefendant's admission, such error may be harmless. *Lee*,

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[2] It is not entirely clear whether the trial court's decision was based on these other factors, or solely on the corroboration between England's confession and Blau's testimony. Regardless, as noted above the Court "remain[s] free to look beyond those cases and reasons relied upon by the state court opinion in determining whether the standards for issuance of the writ set forth in § 2254 (d)(1) have been met." *Thomas*, 951 F. Supp. at 1342.

476 U.S. at 547 ("By holding that the consideration of Thomas' untested confession against Lee violated Lee's Confrontation Clause rights, we do not foreclose the possibility that this error was harmless when assessed in the context of the entire case against Lee."); *see also, People v. Lee*, 517 N.Ed.2d 628 (Ill. Ct. App. 1987) (on remand from *Lee*, finding, error harmless with respect to one of defendant's conviction but not with respect to the other conviction). At trial, Blau gave an account of the murder that was substantially the same as that given by England in his confession to the police. *See* Trial Tr., Vol. XI, at 124-75, Trial Tr., Vol. XII, at 30-114, 134-219. Further, Blau's account was corroborated with other evidence. For example, petitioner had spoken with others about murdering her husband. Trial Tr., Vol. III, at 184-90, 203; Trial Tr., Vol. IV, at 81-83, 236-39. Blau's brother verified both Blau's and England's statements that petitioner showed Blau the location of the victim's house. Trial Tr., Vol. VI, at 199-202.

In reaching its determination, the court of appeals relied on *People v. Richardson*, 204 Mich. App. 71, 514 N.W.2d 503 (1994), which in turn relied on the Supreme Court's harmless error analysis in *Idaho v. Wright*, 497 U.S. 805 (1990). See *Richardson*, 204 Mich. App. at 78,

514 N.W.2d at 506 (citing *Wright*, 497 U.S. at 823 ("[T]he presence of corroborating evidence more appropriately indicates that any error in admitting the statement might be harmless, rather than that any basis exists for presuming the declarant to be trustworthy.")). Given the overwhelming evidence discussed above, particularly the similarity between England's statement and Blau's testimony at trial, the court of appeals' determination that any error in the admission of the England's statement was harmless was not contrary to, nor an unreasonable application of, this existing Supreme Court precedent. *See also, Wright*, 497 U.S. at 822-23 (while reliability of hearsay evidence, such corroboration is relevant to he harmless error analysis); *Cruz v. New York*, 481 U.S. 186, 194 (1987) (defendant's confession may be considered in determining whether error in admission of nontestifying accomplice's testimony was harmless); *Brown v. United States*, 411 U.S. 223, 231 (1973) (error harmless when the improperly admitted evidence "was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury.") Accordingly, the Court should deny the writ of habeas corpus on this ground 28 U.S.C. § 2254(d).

2. *Reasonable Doubt Instruction*

Petitioner also claims that the court's instruction regarding "reasonable doubt" impermissibly lowered the state's burden of proof. "Ordinarily, instructions to the jury in state trials are matters of state law and procedure not involving federal constitutional issues, and are therefore not reviewable in a federal habeas proceeding." *Nickerson v. Lee*, 97 F.2d 1125, 1137 (4th Cir. 1992) (internal quotation omitted) (citation omitted). Accordingly,

> [a] federal court may grant habeas relief only when the challenged instruction "by itself so infected the entire trail that the resulting conviction violates due process;" it is not enough that the instruction was "undesirable, erroneous, or even 'universally condemned[.]"

Nickerson, 971 F.2d at 1137 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *id.* at 146)' accord *Geshwendt v. Ryan*, 967 F.2d 877, 883 (3d Cir. 1992) (court "may order the discharge of a state prisoner on the basis of defective jury instructions only if his or her fundamental due process rights have been violated."); *Hunter v. New Mexico*, 916 F.2d 595, 598 (10th Cir. 1990). Applying these standards, erroneous jury instructions will generally entitle a petitioner to habeas corpus relief only where the trial court omits an element of the crime, shifts the burden of proof on an element of the crime, or, in certain instances fails to

instruct on a lesser included offense. *E.g., Patterson v. Austin*, 728 F.2d 1389 (11th Cir. 1984) (burden of proof); *Brewer v. Overberg*, 624 F.2d 51 (6th Cir. 1980) (lesser included offense).

Applying these standards, the Court's inquiry is two-fold: (1) were the jury instructions erroneous; and (2) if so, was the error so severe as to deprive petitioner of her fundamental due process rights. The court should conclude that the jury instruction in this case were not erroneous, and should therefore conclude petitioner has not stated a cognizable habeas claim based on improper jury instructions.

At trial, the court instructed the jury on reasonable doubt as follows:

> A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It's not an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that –a doubt that is reasonable, after careful and considered examination of the facts and circumstances of this case.

Trial Tr., Vol. XV, at 11-12. This instruction was based on Michigan Criminal Jury Instruction 2d § 3.2. Petitioner asserts that this instruction is erroneous for: (1) stating that a "reasonable doubt" is not a "possible doubt"; (2)

circularly equating reasonable doubt with a "doubt that is reasonable"; and (3) not informing the jury that they must have a "moral certainty" of defendant's guilt. *See* Mem. In Supp. of Petition for Habeas Corpus, at 11.

First, there was no error in stating that a "reasonable doubt" is something more than a "possible doubt." Indeed, in *Victor v. Nebraska*, 511 U.S. 1 (1994), the case primarily relied upon by petitioner, the Court explicitly rejected a challenge to such language in a reasonable doubt instruction:

> Finally, Sandoval objects to the portion of the charge in which the judge instructed the jury that a reasonable doubt is "not a mere possible doubt." The *Cage [v., Louisiana*, 498 U.S. 39 (1990) (per curiam)] instruction included an almost identical reference to "not a mere possible doubt," but we did not intimate that there was anything wrong with that aspect of the charge. See 498 U.S., at 40 . . . . We therefore reject Sandoval's challenge to this portion of the instruction as well.

Victor, 511 U.S. at 17; *see also, United States v. Delpit*, 94 F.3d 1134, 1148 (8th Cir. 1996) ("We have repeatedly

rejected challenges to the 'mere possibility of doubt' language used in this case").[3]

Further, the trial court's defining of a reasonable doubt as a doubt based on reason, while circular, did not render the instruction constitutionally infirm. As one court has noted:

> An instruction that a reasonable doubt is "a doubt for which a reason can be given" merely conveys what is already axiomatic from the plain meaning of those very words . . . While such a definition does nothing to advance the jury's understanding of reasonable doubt, it in no way undermines or destroys their common sense appreciation of that term's meaning.

Murphy v. Holland, 776 F.2d 470, 476 (4th Cir. 1985),

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[3] Petitioner attempts to distinguish the instruction at issue in Victor because that instruction also stated that a jury must have "an abiding conviction to a moral certainty" of the defendant's guilt. However, the *Victor* court's acceptance of the 'possible doubt" language was not premised on the "moral certainty" language. Rather, the Court rested its decision on the fact that it was clear that the trial court was requiring something more than a fanciful doubt. The Court stated: "that this is the sense in which the instruction uses 'possible' is made clear from the final phrase of the sentence, which notes that everything 'is open to some possible or imaginary doubt.'" *Victor*, 511 U.S. at 17. Here, as in *Victor*, the trial court tied "possible" and "imaginary" doubt together, thus making clear the sense in which "possible" was used.

Further, petitioner's assumption that the Court's approval of the possible doubt wording was premised in part on the trial court's moral certainty instruction is unlikely given the Court's criticism of the "moral certainty" language, discussed more fully *infra*.

vacated on other grounds, 475 U.S. 1138 (1986); *cf. United States v. Romero*, 32 F.3d 641, 651-52 (1st Cir. 1994). Nor did the trial court's equating "reasonable doubt" with a "fair doubt" render the instruction unconstitutional. A number of courts have rejected such an argument. *See Thompson v. Elo*, 919 F.Supp. 1077, 1083 (E.D. Mich. 1996) (O'Meara, Jr.) (citing *United States v. Campbell*, 874 F.2d 838, 841-43 (1st Cir. 1989); *United States v. Hall*, 854 F.2d 1036, 1037-39 (7th Cir. 1988); *United States v. Patman*, 557 F.2d 1181, 1182 (5th Cir. 1977)).

Finally, contrary to petitioner's assertion, instructing the jury that they must be convinced of a defendant's guilt to a "moral certainty" is not a constitutional requirement. Indeed, although instructions containing such language may or may not be constitutional, *compare Victor*, 511 U.S. at 21-22, *with Cage*, 498 U.S. at 38-41, the Supreme Court has explicitly stated that it does "not condone the use of the phrase." *Victor*, 511 U.S. at 16; *see also, id.* at 22. In fact, a number of courts have strongly cautioned against the use of such language. *See, e.g., Chalmers v. Mitchell*, 73 F.3d 1262, 1269-70 (2d Cir.), *cert. denied*, 117 S. Ct. 106 (1996); *Smith v. Butler*, 696 F. Supp. 748, 753-54 (D. Mass. 1988), *aff'd*, 879 F.2d 853 (1st Cir. 1989); *see also*, *Victor*, 511 U.S. at 23 (Kennedy, J.,

concurring) ("I cannot understand, however, why such an unruly term should be used at all when jurors are asked to perform a task that can be of great difficulty when instructions are altogether clear."); *id.* at 24 (Ginsburg, J., concurring in part) ("I agree, further, with the Court's suggestion that the term 'moral certainty,' while not in itself so misleading as to render the instructions unconstitutional, should be avoided as an unhelpful way of explaining what reasonable doubt means.").

As the Court explained in *Victor*:

> The beyond a reasonable doubt standard is a requirement of due process, but the Constitutional neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Indeed, so long as the court instructs on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury.

Victor, 511 U.S. at 5 (citations omitted) (internal quotation omitted. Indeed attempts to define reasonable doubt are so troublesome that at least two circuit courts "have admonished their District Judges not to attempt a

definition." *Victor*, 511 U.S. at 25 (Ginsburg, J., concurring in part) (citing *United States v. Adkins*, 937 F.2d 947, 950 (4th Cir. 1991); *United States v. Hall*, 854 F.2d 1036, 1039 (7th Cir. 1988)). Here, the trial court's definition adequately conveyed to the jury that it could convict only if the prosecution had proved petitioner guilty beyond a reasonable doubt. The court's instruction also made it clear that the jury's decision had to be based on a careful examination of the evidence in the case. The instruction did not lower the government's burden of proof, nor suggest to a reasonably jury that petitioner could be convicted based on a lower burden of proof. Accordingly, the Court should conclude that petitioner is not entitled to the writ of habeas corpus on this ground.

D. *Conclusion*

Petitioner has not shown that her trial resulted in a decision contrary to, or involving an unreasonable application of, established federal law. Nor has she shown that her trial resulted in a decision based upon an unreasonable determination of the facts in light of the evidence presented. Accordingly, the Court should deny the application for the writ of habeas corpus. 28 U.S.C. § 2254(d).

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991). *Smith v. Detroit Federation of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address

specifically, and in the same order raised, each issue contained within the objections.

PAUL J. KOMIVES

UNITED STATES MAGISTRATE JUDGE

Dated: October 9, 1997

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LU ANNE SZENAY,

Defendant.

Trial Transcript, December 18, 1990

Ruling of Bay County Circuit Court

Page 171 – lines 3-16

THE COURT: All right. As I indicated before, in - - in People versus Spinks, they enunciate the rule from Watkins and the rule is that a statement against penal interest, exception to the hearsay rule, would make a statement admissible in the Bruton context if in view of the other United States Supreme Court cases there was an added requirement that a codefendant's statement bore sufficient or adequate indicia of reliability. So that's the question that I think I'm faced with in view of Watkins and Spinks. I admit that for years under Bruton there was no question about codefendant's

confessions not coming in when the codefendant didn't testify because it precluded the attorney for the person that the confession.

Page 175 – lines 5-25

THE COURT: All right. Then along came Watkins and Spinks and regardless of the instincts that we have built up and have developed as a result of Bruton and in-have been experiencing, they throw a different light on Bruton and on how it applies in Michigan and that's the law that the case has available to it to follow in Michigan. And that may not end up being the law if the Supreme Courts decides - -of the Supreme Court decides that something is different, but that's the law I have to apply in this case and it doesn't appear tome that it would be fundamentally unfair. What it says is is that confessions really can be used when they implicate a codefendant when the statement that's made is against the penal interest and there are other separate instances of indicia of reliability that can be gleaned from the remainder of the case and can be articulated.

And I think Mr. Kelly's articulated them in both instances that the statements are consistent with what the testimony of Blau, substantially, they're not gonna

be in every respect, but they're consistent with each other evidence in the case that we already had and that

Page 176 – lines 1-10

we're going to be having such as the shotgun and the - - the - -the - -the directions and the location and the movement in the house and the other evidence in the case so that it would appear tome that although this isn't a codefendants confession that's being used against each other, it's similar in that there's a defend - -there is a person who's not a codefendant but is still a defendant testifying. And there is a consistency between his testimony and the confession of Mr. England, at least they're substantially consistent;

Page 176 – lines 13-20

And there is a consistency in the statements and the confessions with the evidence that is being independently offered with respect to the factors in the confession. And the exception which are two, is one, the already referred to statement against penal interest be - -and the unavailable nature of the situation because the witness is not gonna be - -the codefendant is not gonna be testifying.

Page 177 – lines 3-5

and therefore, the Court believes that they are admissible under those cases and overrules the objection to them.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LU ANNE SZENAY,

Defendant.

Trial Transcript, December 18, 1990

Testimony of Robert C. Wummer 12/18/90

Page 109 – lines 6-25

Q Mr. Wummer, I understand you dialed the - - the call that was directed to someplace in Michigan for Jim Blau, is that correct?

A That's correct.

Q Okay, was there any particular reason for your having done that?

A Ah, he was having trouble with the phone, so I put him on the - - one of the end lines and dialed - - the first time he dialed it, he had a problem.

Q Okay. Now this call was not a collect call, was it? It was paid for by your business.

A That's correct.

Q Now you realize that he was in rather desperate financial straits, you knew that, didn't you?

A I did.

Q In fact, he was sleeping in his car, isn't that right?

A (No verbal response)

Q Been known to sleep in his car - -

A Yes.

Q - - because he had no place to stay.

Page 110 – lines 1-25

You stood there while he engaged whoever it was on the other end of the - - of the phone in conversation and during which time he related to them how desperate he was for - - for funds, isn't that correct?

A Correct.

Q He had discussed with you the fact that his father had sent him money, given him money, all that was gone, and did he not tell you that if you would initiate this call for him, that he could perhaps get some money from that person - the person that you - - that you were calling for him? He co - - led you to believe that look, I - - can get some - - they'll send me some money, isn't that correct?

A The last part is correct.

Q Okay. And he needed the money because you had expanded some - - some funds on his behalf, I think you indicate a hundred and fifty here, a hundred bucks there; but in any case, he was kinda into you, wasn't he?

A Yes.

Q So you stood there while he pleaded to whoever it was to send him some money. Isn't that right?

A Yes.

Q And then after the telephone conversation concluded, he gave you assurance - - said look, I'll - - I'll have some money for you shortly, they're gonna send me some money and it'll be here shortly.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LU ANNE SZENAY,

Defendant.

Trial Transcript, December 19, 1990

Recorded Statement of Shawn England 12/19/90

Page 255 – lines 2-8

Q Detective Overstreet, I'm - - or excuse me. Detective Harken, I'm gonna hand you what's been marked as People's proposed Exhibit No. 106, do you recognize that item, sir?

(Proposed PX #106 shown to witness)

A This appears to be a tape that - - that we - - we made on this same day after this interview that I just talked about.

Page 191 – lines 6-8

Q Okay. And who is speaking on the tape?

A Shawn England is speaking, Detective Overstreet, and towards the end of the tape, I asked a few questions.

Page 191 – lines 15-16

MR. KELLY: Your Honor, I would now move the admission of People's proposed Exhibit No. 106.

Page 191 – lines 19-21

THE COURT: All right.

It's received. That's No. 106?

MR. KELLY: 106, your Honor.

Page 258 – line 2-4

MR. KELLY: Your Honor, we'd now ask that we'd be able to play this tape to he jury. We have a small cassette recorder available here to plug in if we may.

Page 258 – lines 16-17

(Off record from 4:29 p.m. to 4:56 p.m. while PX#106, Cassette tape is played)

TRANSCRIPT OF TAPE RECORDED
STATEMENT OF SHAWN ENGLAND

Q=Overstreet A=England Q2=Unknown 3rd party

Unintelligible (4 seconds)

and, and my clock just indicated it's Saturday, it's ah March 3, 1990, and it's now 11:05 a.m.

Q Has there been any threats or promises with made to either one of us . . . lets just say threats, start there, in relation to your . . .

A There hasn't been.

Q . . . involvement in or uninvolvement. How bout promises, were there any promises made to you in relation to . . .

A Just that I'd get fair treatment.

Q And by fair do you mean honest and straight up as far as how you were arrested, is that correct.

A Yes.

Q Um, now you, there was some discussion as we wee going along here, and you were concerned with what was going on in the odyssey of the whole thing, and we were too. Is that, that's why we're here really.

A Right.

Q Now, ah, I'm gonna ask you some other questions that are more or less fill-ins to the whole interview, ah, you were asked some questions to begin with, in that we referred them to our law enforcement and you heard the miranda warnings, because this man by miranda . . .

A Yeah.

Q You, you in fact went to school for 2 months and went through a lot of law enforcement trainings, and you know who Mr. Miranda was.

A Right. There's ah __ miranda, in fact it's Arizona where . . .

Q And you know there is certain rights you have and you don't have to say anything that will go through in . . .

A Yes, I am aware of that.

Q Ok. Ah, when we started right off the bat you said that ah, that your mom . . . that you're not living at the address you were living at before. What was that address that you moved out of.

A 2097 S.E. Rainer Road, Fort St. Lucie, 34952.

Q Ok. You indicated that ah there was some communication between you and Jim ah over the

plane tickets. To go to Michigan, how did he communicate with you . . .

A By phone.

Q And what, in your own words, what did he tell you was going on here in Michigan. Why did he even want you to come?

A He told me that Louann Szaney wanted here husband dead for various reasons. That she would get a lot of money from it and that she'd be willing to give us some.

Q It's simply as that, not confusing or easy for you to understand.

A Yes.

Q Did he tell how long he knew Louann Szaney.

A Yeah. A few weeks.

Q So, it wasn't a long term relation he had with her or anything like that.

A No, it wasn't.

Q Did he . . . why call you?

A We were friends in school, I guess.

Q He told us that he felt he was a good judge of character. Is that something you think he shouldn't say? As to his exact words? That he felt you were

the kind of person that he said if you were going to do something, you would do it.

A Yes, if I said I was going to do something, I would do it.

Q Ok. So you agree with him. So he is a good judge of character.

A Yes.

Q So, if he asked you up front that should you come to Michigan, that he'd kill Tim Szanay or be with him when he killed Tim Szaney, and you said yes, he has no problem with understanding that.

A That's right, that's correct.

Q You would get on the plane without that understanding would you.

A That's correct. That would be a waste of time, that's correct.

Q So you flew to Michigan ah, you had some problems with the flight. You went over some of that, that it was fogged in and you came up to . . . with another guy and drove from Chicago. He picked you up and you go to his fathers, his mother's house first. Did he give you a reason why h didn't go right to his father's house.

A We didn't have a ride back.

Q Ok. And his mother's house I take it, is closer to where you people, where you were dropped of than his dad's house.

A That's correct.

Q One's in Saginaw and on's in Midland.

A That's correct.

Q Ok. After you stayed at his mother's house then you eventually went to his dad's house.

A That's correct.

Q And the next day, after you arrived, you went to the Trading Post and bought a shot gun.

A That's correct.

Q Because you liked with the shot gun looked like. The shot gun went back to his dad's house. Not even enough time to go to his dad's house.

A That's correct.

Q What happened to the barrel that was sawed off . . . the actual physical barrel.

A I don't know. I have no idea.

Q If you're sawing it in the back yard, you have to . . . you just put it on the stump to hold the gun. Because you have to hold it.

A Right.

Q And the barrel just falls on the ground, well then the barrel must still be on ground.

A No it was picked it up and I don't know where it went from there..

Q Do you know who picked it up?

A I did. I gave it to Jim.

Q And where it went from there you have no idea.

A I have no idea . . . just like I don't know where the gun is.

Q Ok. If ah . . . what lever did you . . . a hax saw, do you know what a hax saw is?

A Yes. It was a hax saw. It was a metal, it was ah a metalcon hax saw.

Q You had to get a special blade for it, or was it already on there.

A Well, you just buy the metal blade.

Q Did you guys do that?

A Yeah.

Q Buy the metal blade?

A Yeah.

Q How did you know how many inches to cut of the shot gun?

A I have no idea how many inches.

Q Did you use anything to judge it by?

A No.

Q Had you ever had a sawed off a shot gun before?

A No.

Q Now you mentioned the, and I think this pretty much follows in line, actually the next day, when you're driving around with Jim and you go to Tim Szanay's sister-in-law's house her name is who?

A Renee.

Q Do you know how Jim knew to get there? Did he even say anything to you?

A I believe Louann told him how to get there. Because he mentioned that Louann had told him they own a canvas shop. Ok. And I guess he was looking for that, I guess, to see if he was there

Q Did you actually find the canvas shop?

A No, we didn't. We were driving along the road and he look down, and as he was looking down the side of the street, (excuse me) as he was looking down the side of the street and he saw Tim's car. That's where it is. That's the house.

Q Ok. So you actually were driving down a pretty good size street and you make the that turn onto a smaller street where Tim's car is.

A correct. Now, we hid stuff in a McDonald's so I could use the bathroom. When I was in the bathroom . . .

Q Is it a full service McDonald's? In the middle of the street is McDonald's isn't it.

A I always refer to it as . . .

Q Is it on the same road as you were driving on do you remember?

A Yes. It was on a big road. So I used the bathroom and ah, there was a phone. I believe he called Louann from there. I'm not sure because I was in the bathroom.

Q Ok.

A I believe he called her to see if she knew where he was.

Q Ok. Because you hadn't found the canvas shop and you were still looking.

A Right, Right.

Q When he got out, did he say anything about where he really was or what he was working or whether he was visiting his sister or anything like that?

A He, I believe that knew that it was his sister's house. I believe he thought it was his mother's house.

Q Ok. Ok. Good

A And ah, when he found out he wasn't there we decided to leave. That's why I told him I was leaving the next day, once way or the other . . . and that he'd do it himself. He said fine, I just wanted to get lout.

Q Alright. Did um . . .

Lot's of noise

Q Ok, we're back to the motel, getting ready, had a few beers. What does a few beers mean. To some people it's a case and a half, to some people . . .

A We had quite a . . . all day long, from . . . we had beers all day long, we drank cases, two or three cases of beer throughout the course of the day.

Q Let me interrupt for just a second Shawn. When I first asked you about where did you go from Sue's house, ah, after you left Sue's house, you said Gateway, then I thought we got that cleared up when you didn't go back over by Tim's house . . .

A We did drive over by Tim's to see if he was there, and he wasn't, so we went right back to the Gateway.

Q Ok, was that the first time you had been in the area of Tim's house.

A No, we did go back, we did go there Thurs. . no Tuesday, we went, not Tuesday, Wednesday we went to Tim's house and he shoed me where it was then showed me Thursday, again.

Q So you actually went there twice?

A Right. We kept looking. He wasn't there either day as far as I know.

Q You didn't see his car there?

A No, I didn't.

Q Did you knock on the door?

A Yeah, I did once. No one answered so we left. He did call Louann another day. Wednesday, he called Louann from another McDonald's and we sat and we ate. I remember, he was out there calling her and ah, I guess it was to get somemore money.

Q Ok.

A We needed somemore money for (too much noise)

Q Ok. When did he get that? He did get it, because he . . .

A Well see, we had like $500, I think he got $750 from her before I got there. He spent like $330 on the plane ticket and then the rest he just had with him for different things. You know, I think he paid

part of his with it. He bought the shot gun with it. He ah, bought the hotel room with it, all the beer and everything else.

Q Ok. So when he called that one day and asked for more money, do you have any idea how he . . . did he receive anymore? Or how would have gotten it.

A I don't know. She said . . . what he told us is the exact words he said that she had told him was that she just wants it done and any amount of money, it doesn't matter. She just wants it done.

Q Now there was a . . . there was some discussion between you and him as to who was going to do the work, as to having alibis when the homicide went down, and then you were going to go do it.

A Right.

Q There was argument about that.

A Right.

Q You had a problem with that.

A Right.

Q You don't really know Bay City that well.

A Right.

Q Did you think that . . . what did you think would happen if you went there by yourself.

A I wouldn't have done it. ?????? I wouldn't have known where to go.

Q Ok, you think you might have gotten lost?

A Yeah, I don't think I would have made it to his house. As far as even finding it.

Q Then the decision was that both would go, so that you would know where it was at. Was anybody else with you that night that you went out there.

A No.

Q Now you indicated that you went there, lights were on in the house, and you went around the . . .

A No. Lights weren't on in the house.

Q Ok.

A His car was there and not until I walked around you know, to the side there, did I se the TV on.

Q Ok, so how many other lights were on other than the TV.

A None.

Q Just the light from the TV, that he was watching the TV.

A Right, and the glow on his face.

Q And then what, and then you didn't shoot him at that time?

A No, I didn't. I walked back and I told Him that he was sitting there, and what does he want to go.

Q And his, his answers?

A Go do it.

Q Ok, so it was very shot. Let's do it.

A Right.

Q Then you went ahead, and went back to the window. Now you mentioned something, I didn't quite understand, you said, believe you were talking about second nature. . . and you don't really believe you made any noise or when you were by the window. I mean you didn't break the window with the gun or anything by accident? Because the windows were broke, but that's from the shot.

A Right.

Q So, explain that to me.

A I believe it was like that sixth sense people have.

Q Ok, alright.

A somehow he knew just at that point in time to look over.

Q Ok.

A For some reason, he knew. And when he did, he saw me, and he pushed his feet back, and the couch rolled back. He . . .

Q You took a shot at that time.

A Right. Just as I was firing, he was pulling back.

Q No you indicated that he, that you missed.

A Right.

Q What makes you think that. Because he was getting ????

A I don't think so. He was totally out of the line of fire. He scooted all the way back to the wall. Next to the hall or wherever, he scooted all the way back.

Q When's the next time you seen him.

A The next time I saw him was, he was running, he was right in the hall way there, and I fired again, and I missed. I might have hit him a little.

Q Ok.

A By that time Jim was around the front of the house already.

Q Ok. Jim didn't leave after the second shot, he left after the first.

A Right. He didn't even stick around and wait.

Q How did he know to leave. How did . . .

A He just went . . . he knew I missed and he was going to go get him.

Q Did you say you missed. Did you say something like, "damn I missed or shit I missed" how did he know. Did you say you're supposed to know where the bullet . . .

A Yeah, he was standing right behind. I was standing in the window . . . I was standing at the window and he was standing right behind me.

Q So he could also see.

A He could also see.

Q Ok. So he knows after the first shot, someone scooted that couch back and . . .

A He just took off. He got around front and busted in the door.

Q Ok. So the last time you seen Tim, he's at the corner, and you took a shot, in . . . .

A Right.

Q You don't' see him again until when?

A Til I went around to the front of the house and Jim's holding him. He's got him in another position.

Q Right. So when you indicated before about Jim grabbing him by the waist and spinning him around

and making him kneel down, did you get all that ????

A I saw it.

Q As you're going . . .

A I saw it, I was there. He was trying to get out of the window and Jim grabbed him and spun him around. I was there, I watched it, I watched him make him kneel.

Q Ok, so you got there at the time, at the time Jim got to him at the window?

A Right.

Q And . . .

A I was standing right at the front door watching.

Q Do you remember the victim saying anything?

A He just asked "why."

Q Ok. And did anybody answer him.

A No.

Q Did Jim say anything at all.

A He just said just do it.

Q But he's talking to you?

A Yeah.

Q He's not talking to the victim. And did he make any indication at all that he knew who Jim was?

A No, he didn't.

Q And ah . . .

A Yeah, yeah, I think he did come out and try to yell at Jim.

Q Now, as you come in the house, Jim has now moved the victim in the kitchen.

A I guess . . . it looked like a hall way to me.

Q To you it's a long hall way. We know it's a kitchen, that's the only reason I said that. So your, is he facing, is Tim facing you?

A Tim was facing the floor. In that position . . .

Q Ok, he was facing the floor. So he was never shot, you shoot him again.

A That was the one where he dropped.

Q You shot him in the back. Tim, but was Jim, in your face, Jim was physically holding him when he shot, the shot that hit him in the back.

A Yeah. Jim was physically holding him.

Q So when you shot him, Jim let's go.

A Right. He fells on his face.

Q Was there any communication between the two of you after that shot?

A I believe Jim said is he dead.

Q Ok, so you are concerned whether that shot killed him or not? Did he say anything else?

A (no answer)

Q Ok, he didn't say shoot him again, or make sure he's dead or anything like that.

A He said come on, as far as I remember.

Q That was the second shot. You don't recall the second shot. If there was a second shot, was it something that was done by yourself. You didn't hand the gun to Jim and have him shoot a shot or anything like that?

A Jim ran and he was out, I remember following him.

Q Ok. So he was quite a ways from you. Was the car started by the time you got there.

A No. He was in the car, just starting it as I jumped in the back.

Q So you didn't sit down in the passenger front seat, you just dove in the back seat.

A In the back seat.

Q And you remember, what did you do after you got in the back seat.

A I . . . . at the gun again.

Q What did you do with the gun?

A I put it in a box.

Q Ok. That was in the back seat.

A Yes.

Q Was there anybody in the neighborhood?

A Yeah.

Q And where were they?

A They were down the street.

Q Ok. You took of, the car took off, lights on it?

A No, lights off.

Q You didn't shine em.

A Yes.

Q So you remember the turns that you had to make?

A Yes.

Q Go ahead, describe em.

A We went down one street, to Tim's Szaney's house, copped the first street, you go by Tim Szaney's house and it's a dead end down here. There's two streets here. Ok, we passed the first one went on the second one. Hung a quick left, headed all the way down, got up to that other main street, took a right. Head all the way down to the street that the State Police offices are (Euclid), took a, took a right (that would be a left) ok, no you went down the street of the police offices, took a right, all the way down and . . .

Q While you're driving down the street, does it, it turns into a freeway. It turns into a divided

highway. What were you doing anything during that ride?

A I was sitting there.

Q You left your shells in the car.

A No.

Q You don't have any shells in the car? You shot, it shot 15 shells before, so you only had 5 left for the gun. Yet the box was in the car.

A No.

Q You didn't throw anything out the window or anything like that?

A Ah.

Q The gun's in the box in the back seat.

A Yes.

Q Where did you go? The first place you went after that?

A The Round Up.

Q Dropped Jim off.

A Yes.

Q Now you're driving the car.

A I went back to ah the hotel . . .

Q That's a long trip, isn't it? From the Round Up to the hotel?

A Not really.

Q Ok.

A It's right down the same street.

Q You went back to get him right.

A Right.

Q Then what happened.

A I ah, took the gun in the room, I burned some stuff he told me to burn, the directions, there was a map the Louann had made for Jim and ____ to Tim's house.

Q Did you people, you and Jim follow that map on Tuesday, the first time that you were thee. Did you follow that again on Wednesday when you went out there.

A Jim remembered where it was.

Q He remembered where it but you did follow it Tuesday. Did the map have anything else on it besides the house location, did it have his mother's house location or anything.

A No, it just had the house location.

Q Ok. So you burned . . .

A It also had Jim's, ah Tim, no, not Tim, Louann's phone number at the apartment, wherever. And he also has ah, that's about it.

Q So you burned that.

A I burned that.

Q Ok

A I went back to the Round Up.

Q Ok. And so then you stayed there how long?

A Til 2:00 in the morning til close.

Q Now your anxious to get out of town.

A Yes.

Q You hadn't bought the plane ticket yet.

A No.

Q So, where does the money come to buy the plane ticket.

A It was supposed to come from Louann. Jim said Louann was going to give him a thousand dollars, enough for me to get home and get to Florida. But, ah he couldn't get a hold of her so, Kim came over and Jim asked Kim if he could borrow $500. She said yes. So she worked to the airport, because she was going to give me a ride down there. Kim words at the airport there. So we went down to her bank, she got the $500, she gave it to me. And we went and I bought my plane ticket, got on the plane, went to Detroit, waited in Detroit I had to go stand by because I bought my plane ticket right then. I got on a business flight, the one going

home. I got on the plane, went directly through from Detroit, to West Palm Beach. I (can't understand, he's mumbling)

Q So you got to West Palm Beach and came back up here to St. Lucie where you were with your mom. Now, Tim received some money from Louann very recently, within the last ah.

A Who?

Q Jim.

A Jim.

Q Good, if I make the mistake with the names, you correct me. Jim received some money from Louann very recently, like last ah, Tuesday. Did you know that?

A We were moving out last Tuesday, Ok. Every single stuff was out of the house and my mom said that Jimmy was talking to Jean about getting some more money. Ok. Now she heard him over talk, over speaking. I asked Jim I said "are going to get some money or something." And he said yeah, Louann is going to send me somemore money. So I could get a place.

Q So who's I. You or so Jim could get a place.

A So Jim could get a place.

Q Right, ok.

A And ah, I didn't say anything about giving me any money, I just said alright fine.

Q So you don't know that he received a thousand dollars. He didn't give you a hundred or thousand dollars.

A No, he didn't.

Q Now he indicated to us that he gave you $500 to go home.

A Ah . . .

Q Did you get the entire $500 and subtract the plane ticket and your meals . . .

A Right.

Q So that's a true statement that he gave you this money.

A Right.

Q It's your understanding if you use figures that you've heard of $300,000 insurance and 10%, that you're eventually gonna get $15,000.

A That's what was understood.

Q Would you have done this for any reasons other than getting money?

A No.

Q There was a comment made about that you don't like people who ah, men you rape women or men who beat women or treat them . . . .

A Where'd you hear that?

Q Jim told me that. Did you ever discuss that?

A With Jim?

Q With Jim.

A He talked to me that Tim did beat . . .

Q Yes, that's what I'm talking about. Was that ever discussed as to her using this to convince you that he wasn't . . .

A That was part of it, I also don't like drug dealers (laughter). I don't like people who sell drugs. I don't like people who really take drugs, you know. That was another reason I . . .

Q Had he admitted he was a drug dealer?

A Yeah, Jim had told me that he was dealing drugs. And there are soemthings in this world I just really don't like, and I don't think there are any reasons those people should be allowed to live. It's just me, you know.

Q You got a lot of that information from Jim, where do you think Jim got this information?

A Louann.

Q Ok. What um, . . .

A Louann told Jim everything he knew about Tim. Like . . .

Q Do you really think Jim has ever even met Tim?

A No. He didn't. I'm pretty sure he didn't.

Q He told us that Tim stopped him one time driving his van and asked him who he was and why he was driving his store van. Once, once, Jim explained it to him, Tim was happy, I mean he was working he just thought it was some boy driving Louann (mumble) his delivery van. Did Jim ever tell you that, that he was the only time he had ever met the man.

A He never told me that.

Q Ah, have you ever killed anybody else?

A No. I've been close to somebody who died by accident, Ok . . .

Q Do you have any questions as your were going home there.

(change in voices, somebody else is asking Shawn questions)

Q2 Since this has all happened, ah Shawn, has Jim ever spoke to you what he did with the shot gun.

A No.

Q2 Ok. The other think is you had mentioned to John and I that ah, you had bought a box of 20 shells at the same time that you bought the shot gun. Ah, and then you mention that you shot those, about 15 of those shells, before hand.

A Yes.

Q2 that was at Jim's dads or mom's house.

A Dads. Because he lives back in the woods way, way back in the woods.

Q2 Did you leave the shell casings laying on the ground back there?

A Um, . . .

Q2 As far as you remember?

A No, I believe they were all picked up.

Q2 What did you do with them then?

A I threw them away.

Q2 Ok.

A I'm pretty sure because I remember the first shot I took I racked it and the shell flew out and I just picked it up and I was gonna shoot it and not leave em on the ground.

Q2 Ok. Um. Then at what point were the 5 shells mounted into the ground, into the grind.

A Um, I believe that night.

Q2 Before you left . . .

A ????? to investigate me. Yes.

Q2 That's all I have.

Q I have not further questions. We still don't know what the questions we have because we went from a first initial interview. Ah, beginning the time we started this interview it's now starting at 11:31 a.m.

Now 11:31, yup. Do you want to stop this

End of tape.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LU ANNE SZENAY,

Defendant.

Trial Transcript, December 19, 1990

Testimony of Detective Harken 12/19/90

Page 231 – lines 17-25

Q I wanto turn your attention to Saturday, March the 3rd of 1990, do you recall doing an interview on that date with Shawn Marcus England?

A Yes.

Q What time did this interview take place Sir?

A Approximately nine a.m.

Q And where did it take place?

A At the Martin County Sheriff's Department, Florida.

Q And who was present during this interview?

Page 232 – line 1

A Myself, Detective Overstreet, and Shawn England.

Page 246-247

A Said the next morning they were at Jim Blau's father's house. He mentioned that Jim was trying to get some money for him to get out of town and that Jim had a conversation with LuAnne that morning.

Q Let me- -

A I rem - - I remember him [Shawn England] saying that Jim contacted a girl friend by the name of Kim who came to the house and then Jim wanted to spend some time with Kim alone that morning so Shawn went outside and then eventually Kim handed Shawn five hundred dollars. Apparently Kim worked at the airport and then Kim used that money, or I'm sorry, Shawn used that money to catch a flight to Detroit and then back to Florida.

Page 251 – lines 12-25

Q Okay. Thank you. Did there - - was there any mone-money mentioned in this conversation.

A Yes. He said that Jim was going to be - -Jim mentioned that LuAnne, Tim Szenay's wife, would be collecting three hundred dollars in insurance - -

Q Three hundred?

A Three hundred thousand dollars –

Q Okay.

A - -in insurance, and he said that they would be getting ten percent of that, thirty-thousand dollars.

Q What did-what else did he say about that ten percent?

A She said that - -he said that Jim Blau told him that LuAnne told him that if anything was to happen to LuAnne's husband, Tim Szenay, Jim Blau would be well taken care of.

Page 252 – lines 1-9

and he mentioned that ten percent again.

Q Did he indicate how much money he was supposed to get out of this deal?

A He said he was gonna get half of that thirty thousand dollars, which would be fifteen thousand dollars.

Q Did he say anything about Jim getting any money before or after this?

A He said that Jim was getting money from LuAnne before and after the homicide.

Page 253 – lines 12-25

Q Did he indicate if Jim had made any contact with LuAnne either that night or the next day?

A Shawn told me that Jim called LuAnne on the night of the homicide from the Round-up Bar and that the next morning that he - -LuAnne called Him – hold on a second here. Told me that – told me that Jim called LuAnne that night from the Round-up Bar and that he talked to her the next morning. He called her from the Round-up. LuAnne called Jim back at Jim dad's house the next morning and he overheard them talking.

Q When you refer to he, you're talking to Shawn?

A Shawn, he overheard Shawn (sic) talking to LuAnne.

Q Okay. Did he indicate what he heard Jim Blau saying during this conversation?

Page 254 – lines 1-9

A Yes, he said during that conversation, Jim-LuAnne was telling Jim Blau that her husband had been killed and it - -was trying to make it sound like she was making the announcement to Jim Blau and he said the reason they were doing that is-is they figures their lines were tapped at that point and they figured the police were listening in so-so

LuAnne was trying to make it sound like-like it was a surprise or a surprise announcement to Jim Blau that Jim Blau didn't know about this.

Page 255- lines 2-8

Q Detective Overstreet, I'm - -or excuse me. Detective Harken. I'm gonna hand you what's been marked as People's proposed Exhibit No. 106, do you recognize that item, Sir?

(Proposed PX#106 shown to witness)

A This appears to be a tape that - -that we - -we made on this same day after this interview that I just talked about.

Trial Transcript Thursday, December 20, 1990

Page 17 – lines 3-25

Q Detective Harken, after you completed your investigation in Florida, did you eventually return to Michigan?

A Yes.

Q Do you know when you returned, Sir?

A Around the 5th of March, 1990.

Q And who did you return with?

A Detective Overstreet, Shawn England, and James Blau.

Q And was anyone in your custody, Sir? Was anyone in your - -

A James Blau - -

Q - -custody?

A James Blau and Shawn England were in custody.

Q And from your custody, where did you take them, Sir?

A Bay County Jail.

Q On may the 18th of 1990, were you in - -were you involved in the apprehension of some people that you had previously had custody of?

A Yes.

Q And where did you find these people?

A They were stopped in a car on Beaver Road at I-75 at a gas station.

Q And who did you find there, Sir?

A Shawn England and James Blau.

Page 18 – lines 1-7

Q And were there any others?

A Yeah, there was a person that was driving the car, I believe his last name was Kane.

Q And what did you do with those individuals, Misters England and Blau?

A They were taken into custody and transported back to the Bay County Jail.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V

FILE NO. 90-1270

LU ANNE SZENAY,

Defendant.

Trial Transcript, December 27, 1990

Testimony of Co-defendant James Blau 12/27/90

Page 139 - lines 1-5

And so we met at a bar, Bushey's Bar in Midland, and we talked about it. And then was when she first gave me the money.

Q How much did she give you?

A Three hundred and fifty.

Page 142 – lines 17-18

Q How did – how did you get Shawn England up here?

A With a plane ticket I purchased from that initial money .

. .

Page 147 – lines 20-23

Q Do you know how much was paid for the - -for the weapon?

A A little over a hundred, 120.

Q And where'd you get the money for the shotgun?

A From LuAnne.

Page 153 – lines 1-2

And when we couldn't find him, I'd - - I called LuAnne from the McDonald pay phones, off a Wilder Road;

Page 153 – lines 6-7

And she told me over the phone how to get to one of his family's house - -

Page 167 – lines 1-5

Q What happened with Shawn when you went back to the bar, did he go in with you?

A No. He went back to the hotel. And I told him to burn the map, the picture, and anything else that had anything to do with it.

Pages 168-169

A She said that that evening, if I went over to a residence on Dix Street, in Midland, that there would be a brown Chevette there, and there would be money in the ashtray. * * *

A We pulled up, we found the - -the place and saw the car. I got out of the car, Bret's car, and ran up to the

little brown car, and opened it, looked in the ashtray, and I didn't see any - -any money in there.

Page 172 – lines 11-12

A We talked to the Krauses some more; I talked to LuAnne; and she gave me $800.

Page 174 – lines 4-9

Q Did LuAnne Szenay ever send you any money when you were in Florida?

A Yes, she did.

Q How much, if you recall?

A The first time, she sent me a couple hundred dollars. And then, after that, she sent me a thousand dollars.

Trial Transcript, December 28, 1990

Page 67 – lines 12-16

Q It is also part of that agreement that the People will rec- -request a dismissal, after sentencing, of the first-degree murder and escape awaiting trial for felony charge against you?

A Yes, sir.

Page 67 – lines 6-14

Q And you knew that that , if you were convicted of that, would result in your going to li - -to prison for the rest of your life with no possibility of parole; is that correct?

A Yes, sir.

Q And that was one of the reasons, one of the reasons, that you decided to testify on behalf of the prosecution, is to get that consideration; is that correct?

A That is why I took the plea bargain.

Page 68 – lines 3-4

Q Okay. You haven't been sentenced yet; is that correct?

A Correct.

Page 184 – lines 16-22

Q Mr. Blau, let me see if I can repeat my question again, if you would answer it for me. At the time that you were arrested in Florida by Detective Harken and Overstreet, they indicated to you, they explained to you that LuAnne Szenay had supposedly implicated you in the murder of Timothy Szenay; isn't that correct?

A Yes, they did.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LUANNE SZENAY,

Defendant.

Trial Transcript, December 7, 1990

Testimony of Susan Szenay

[p. 227]

Q Now, was that an accurate description of the way she related it to you? I mean, did she relate it to you in terms of it having been a vision of hers?

A It was a fantasy of hers.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LUANNE SZENAY,

Defendant.

Trial Transcript, December 11, 1990

Testimony of Bret Fultz

[p.208]

Q But he said that he hated her husband.

A Uhm, his statement was - -that was, this was at another time.

Q Yes.

[p.210]

Q state - -okay. And that was in elation to an incident that took place where Tim [Szenay] apparently had made contact with Jim Blau when Jim was driving the company van.

A Correct.

Q Okay. What - -what was that statement if you can recall that Jim made?

A Uhm, Jim said that Tim stopped him and started yelling at him and - -for, you know, why are you driving my van? Do you know that I own that store? Statements to that effect. And Jim said, you know, that it really made him mad that, you know, he really couldn't say anything back to the guy, you know, he didn't know what - -quite sure what was going on.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LUANNE SZENAY,

Defendant.

Trial Transcript, December 11, 1990

Testimony of Melony Szenay

[p.249]

Q Okay. And did you not tell the police that in addition to your having suggested that LuAnne told you that your - -your dad may not live until June when you graduate because of his involvement in drugs, did you not also tell them that every day your father was having an altercation with LuAnne while you were there?

A Ah, arguing, fighting.

Q Yes, ma'am. Didn't you say to them?

A Not every day, but it was often.

* * *

[p.250]

Q Just a - -just a second please. And that sometimes your father would hold LuAnne against the - -by the throat against the wall.

A On one occasion, yes, I - -he did do that.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LUANNE SZENAY,

Defendant.

Trial Transcript, December 11, 1990

Testimony of Fredrick Austin

[pp.98-99]

Q Sir, do you recall that particular shotgun?

A Ah, not in that condition.

Q Okay. Well, maybe that's answering my question kinda backwards. Do you re-recall the way the sho- -do you recall when - -what the shotgun looked like when you sold it?

A It would be as ordinary shotgun. If I may say, we wouldn't - -

* * *

Q Okay. Okay. And the - -the Exhibits No. 74 and 75 indicate the buyer to be whom, Sir? You need to - -

* * *

A Shawn England.

* * *

Q Thank you. Sir, on the items 74 and 75, does it indicate a date of purchase of that particular weapon?

A On 1-17 of '90.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LUANNE SZENAY,

Defendant.

Trial Transcript, December 11, 1990

Testimony of Keith Overly

[pp.215-216]

Q I wanta turn your attention to a Thursday night in January of 1990, do you recall a time when Jim Blau borrowed your car, Sir?

A Yes, Sir.

Q And why did you let Jim Blau borrow your car?

A He had car trouble with his, the motor was blown out of his car.

Q And sometime later that day or evening, did he return your car keys to you?

A Yes, Sir.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LUANNE SZENAY,

Defendant.

Trial Transcript, December 14, 1990

Testimony of Kim Tessin

[p.151]

Now do you recall a time last year when Jim [Blau] came back from school in Florida?

A Yes.

Q Do you remember approximately when that was?

A Beginning of December.

Q And when Jim came back, did he have a job right away here in town, or in Midland?

A Not right away, no.

Q And did you about that time lend him or give him some money?

A Yes.

Q Did he, shortly after that, get a job?

A Yes.

Q Okay. Where was that, do you know?

A Well he got two of 'em.

Q Okay. Where - -do you know where he got jobs?

A One was at the Health Nut in Bay City and one was as the Rockin' Roundup in Midland.

* * *

[p.154]

Q Can you tell us where you took Shawn [England]?

A I took Shawn to the airport – Tri-City.

Q That day, did you lend Jim any money?

A Yes.

Q How much, do you know?

A Five hundred.

Q Five hundred dollars?

A Yes.

Q Did you give that money to Jim?

A No.

Q Who did you give it to?

A Shawn.

Q Where did you get the money?

A Comerica Bank.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LUANNE SZENAY,

Defendant.

Trial Transcript, December 14, 1990

Testimony of Gary Blau

[p.218]

Q All right. Now do you recall when Jim left to go back to Florida, approximately when that was?

A I don't know the exact dates. I should probably check these things cause I have a pretty big bill the day he left so - -

Q And how was that?

A Well, his car was - -he was continually having a problem with his car and the minute his car was fixed he left, so I have a - -a car bill from that day.

Q Okay. So you helped him out with paying for his car repair?

A Yeah.

* * *

[p.225]

A I had to get his car fixed.

Q How much did that cost?

A I - -I can't tell you the exact numbers.

Q Was it over eight hundred dollars?

A I think so, yes.

Q All right. And did you also have to give him some money?

A Yes, I gave him some money.

Q How much did you give him?

A I'm trying to - -

Q Yea.

A - -probably four or five hundred dollars.

Q Okay. Anything else?

A Yes, I have him my Texaco card - -

Q Okay.

A - -so he could get gas.

* * *

[p.226]

Q But you're satisfied that - -are you satisfied that the money you gave him he needed?

A I felt he needed it, yes.

* * *

[p.227]

Q Did you tell you he had enough money for gas?

A He told me he didn't have enough money for gas.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LUANNE SZENAY,

Defendant.

Trial Transcript, December 21, 1990

Testimony of Donald P. Santini, Sr.

[p.170]

Q But he [James Blau] indicated that he was the one doing the shooting.

A At first.

Q During the first statement.

A At first.

* * *

[p.171]

Q The second day, you asked him a question, "I thought you said you blew his head off"; you asked him that question, right?

A Yes, sir.

Q And you said that you asked him that question because he was kind of changing the way he was describing the events.

A Yes, sir.

Q And then he gave you another, altered, version of what had happened during the shooting?

A Yes, sir.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LUANNE SZENAY,

Defendant.

Trial Transcript, December 28, 1990

Testimony of Bonnie Banaszak

Volume XII [p.115]

Q - -who in - -and Sergeant Harken wrote in his police report that you told him that Blau responded, after, apparently a phone call or something like that, "that Blau responded that he wished Tim would come into the store and start something so he could kill him and he and LuAnne could split the insurance money. Bonnie advises that was said several weeks before the homicide."

You're aware that that's in he police report, are you not?

A Yes.

* * *

[p.117]

BY MR. KELLY:

Q Do you recall the statement itself being made by Jim Blau to you at the store? Do you recall those words that he said to you, he wished Tim would come into the store and start something so he could kill him, and he and LuAnne could split the insurance money; do you recall those words being said to you by Jim Blau?

A Yes.

* * *

Thursday, January 3, 1991, Volume XIII [p. 52]

Q What did Mr. Blau say to you several weeks before January 18th, 1990?

A He said he wished that Tim would walk through the door and throw a punch at him so that he could kill him and split the insurance money with LuAnne.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LUANNE SZENAY,

Defendant.

Trial Transcript, January 3, 1991

Stipulation

[p.41]

MR. KELLY: Thank you. Ladies and gentlemen, there's been a stipulation, an agreement between the parties, to the following matters: First, the – there was a complaint for divorce filed by LuAnne Szenay from Timothy Szenay; and that was filed with the Bay County Clerk's office on November 17, 1989. Secondly, an order was entered in that case regarding the business, giving LuAnne Szenay exclusive possession of it, of the business, pending the outcome of the divorce. And that was signed by the Court on November 28, 1989.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LUANNE SZENAY,

Defendant.

Trial Transcript, January 4, 1991

Prosecutor's Closing

[p.34]

On March 1st, 1990, James Blau is arrested in Florida and confesses to the police. On March 2nd, 1990, Shawn England is arrested in Florida; and on the third, he confesses to the police, implicating James Blau and LuAnne Szenay in the murder and conspiracy to commit murder of Timothy Szenay. In his statement to the police, Mr. England gives intimate details of the killing. He says he's to get $15,000 for his part from the insurance money on LuAnne's husband; gives a grisly account of what he and Jim did before, during, and after the murder. He even drew a diagram of the house – Exhibit Number 107 –

diagram of the house, showing where he went, where Jim went, their routes, and a diagram of the house and the porch area that was being built outside.

[p.49]

You can see how what Jim Blau says, and most of what Jim Blau sa-has said to you is corroborated by some other piece of evidence or some other witness. For example, the statement by Shawn;

* * *

This murder could easily have gone unsolved, but he couldn't keep quiet. Nor could Shawn after he's talked to by the police.

* * *

[p.50]

Now, let's look at Shawn England for a moment. We've got Shawn England's taped confession to the police; you've heard it in its entirety.

* * *

[p.51]

Shawn told him about a murder in Michigan. He gave details about the killing, including the fact that he and Jim were supposed to receive $30,000;

* * *

[p.52]

But it also fits together with the facts we've heard without Jim, with Jim, and with Shawn's statement;

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LUANNE SZENAY,

Defendant.

Trial Transcript, January 4, 1991

Prosecutor's Rebuttal Argument

[p.167]

We want you to listen to the tape, too. Look at the detail of his statement. Shawn could have denied everything that the police put to him, but he didn't; he told them about the story. He told them what happened, he told them of his involvement and Jim's involvement; and his belief or his knowledge of LuAnne's involvement.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LU ANNE SZENAY,

Defendant.

Trial Transcript, January 8, 1991

Jury Communication 1/8/91, p51

(Jury returns to courtroom at 11:12 A.M.)

THE COURT: Please be seated. All right, we've received a note from you:

"Could we please see and hear England's tape from Florida?"

We have that as an exhibit and that can go in with you to the jury room if you wanna listen to it.

STATE OF MICHIGAN

IN THE EIGHTEEN JUDICIAL CIRCUIT

COURT BAY COUNTY

PEOPLE OF THE STATE OF MICHIGAN

V FILE NO. 90-1270

LU ANNE SZENAY,

Defendant.

Trial Transcript, January 8, 1991

Jury Instruction, Reasonable Doubt

[pp.11-12]

A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendants are innocent. This presumption continues throughout the trial and entitles the defendants to a verdict of not guilty unless you're satisfied beyond a reasonable doubt that they are guilty.

The defendants are not required to prove their innocence or to do anything. Every crime is made up parts called elements. The prosecutor must prove each element of the crime beyond a

reasonable doubt. If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.

A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It's not an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that – a doubt that is reasonable, after al - - a careful and considered examination of the facts and circumstances of this case.